(21,068.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 101.

LUTCHER & MOORE LUMBER COMPANY AND H. J. LUTCHER, PETITIONERS,

vs.

WILLIAM H. KNIGHT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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United States Circuit Court of Appeals, Fifth Circuit.

No. 1629.

LUTCHER & MOORE LUMBER COMPANY, Plaintiff in Error,
versus
WILLIAM H. KNIGHT ET AL., Defendants in Error.

Error to the Circuit Court of the United States for the Western District of Louisiana.

[Original Record Filed December 10, 1906.]

U. S. Circuit Court of Appeals. Filed Feb. 5, 1907.
CHARLES H. LEDNUM, *Clerk.*

1 *Transcript.*

No. 276.

WILLIAM H. KNIGHT ET AL.
versus
LUTCHER & MOORE LUMBER COMPANY ET AL.

Appealed from the United States Circuit Court, Fifth Circuit, Western District of Louisiana.

Alexander & Wilkinson, Holland & Holland, Mason Williams, Attorneys for Defendants, Plaintiffs in Error.
A. J. Murff, M. J. Cunningham, Jr., Attorney- for Plaintiffs, Defendants in Error.

To the Honorable Judge of the Twelfth Judicial District Court of Louisiana, sitting in and for the Parish of Vernon:

The petition of William H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight, wife of James Durham, and James Durham for the purpose of aiding, authorizing and assisting his wife herein, with respect represents that your four first named petitioners are the children and heirs at law of Mrs. Mary Cain, deceased, wife of William J. Knight, petitioner's father; that their said father and mother married on the 29th day of July, 1875, that their said mother died on the 7th day of August, 1885, leaving property in community with her said husband, William J. Knight, and four children and heirs, your petitioners; that during the marriage between their mother and father and during the existence of said community, to-wit, the 28th day of July, 1882, their said father, William J. Knight, bought from J. A. Lovett and D. R. Knight, composing

the firm of Knight & Lovett, the following tract or tracts of land situated in the Parish of Vernon, to-wit: South half of Section Thirty-three (33), in Township One (1), south of Range Eleven (11), West; Southeast quarter of Northwest quarter, Southwest quarter of Northeast quarter, West half of Southeast quarter and East half of Southwest quarter of Section Five (5); West half of Southwest quarter of Section Seventeen (17); Northeast quarter of Southeast quarter of Section Eighteen (18); East half of Northwest quarter and Northeast quarter of Northeast quarter of Section
2 Twenty (20); North half of North half of Section Twenty-one (21); Northwest quarter of Northwest quarter of Section Twenty-two (22); South half of the Northeast quarter, Southeast quarter of Northwest quarter, West half of Southwest quarter, Northeast quarter of Northwest quarter & the Northwest quarter of Southeast quarter of Section Twenty-three (23); Southwest quarter of Northwest quarter of Section Twenty-four (24), and the Northwest quarter of the Northeast quarter of Section Thirty-four (34); all in Township Two (2), south of Range Eleven (11), West, & that their said father continued to own said lands up to and at the time of the death of their said mother, and they constituted a part of the community aforesaid left by her; that immediately upon the death of their said mother, on August 7th, 1885, your petitioners, as the heirs at law of their said mother, became the owners in indivision of an undivided half interest of said lands, their father being the owner of the other half, but without right or authority to dispose of petitioners' half; that after the death of petitioners' mother, but without opening her succession and without any legal right so to do, their said father, William J. Knight, by three several acts of sale made February 5th, 1887, February 7th, 1887, and April 13th, 1889, sold and disposed of all of said lands, when he owned only an undivided one-half interest therein; that all of said sales made by their said father, as to petitioners' undivided half interest, were and are absolutely null; that all of said lands are now held by Henry J. Lutcher and Lutcher and Moore Lumber Company, the latter, a corporation domiciled at Orange, Texas, of which Henry J. Lutcher is president, and the former a resident of Orange, Texas, and both non-residents, and, therefore a curator *ad hoc* should be appointed to represent them herein; that petitioners are the legal and *bona fide* owners of an undivided one-half of all said land, as to which half the possession of said Lutcher & Moore Lumber Company, and the said Lutcher is without legal right, notwithstanding said pretended acts of sale under which they hold and as to petitioners' half, they are mere trespassers; that petitioners' father, William J. Knight, married on the 18th day of June, 1886.

Wherefore petitioners pray that a curator, *ad hoc*, be appointed to represent the non-resident defendants; that they be cited according to law, for judgment against them recognizing petitioners as owners of and undivided half interest in said lands and putting them in possession thereof and for general relief.

M. J. CUNNINGHAM, Jr.,
Attorney for Petitioner.

3 Let W. B. Williamson be and he is hereby appointed curator, *ad hoc*, to represent the absent defendants, Henry J. Lutcher and Lutcher and Moore Lumber Company, and let said defendants be cited according to law.

Done, ordered and signed on this the 9th day of March, A. D. 1903.

J. B. LEE, *Judge.*

I hereby accept the appointment of curator, *ad hoc*, to represent the non-residents, Henry J. Lutcher and Lutcher & Moore Lumber Company herein.

This 11th day of March, A. D. 1903.

W. B. WILLIAMSON.

Filed March 11th, 1903.

J. J. HICKS,
Clerk, 12th District Court.

* * * * * * *

Petition for Removal to Circuit Court.

In the District Court of Vernon Parish, State of Louisiana.

Petition for Removal to the Circuit Court of the United States, Western District of Louisiana.

WM. H. KNIGHT, JOHN A. KNIGHT, Miss STELLA KNIGHT, Mrs. FLORENCE KNIGHT, Wife of James Durham, and JAMES DURHAM, Plaintiffs.

vs.

HENRY J. LUTCHER & LUTCHER & MOORE LUMBER COMPANY, Defendants.

To District Court, Vernon Parish, Louisana:

Your petitioners, the Lutcher & Moore Lumber Company and Henry J. Lutcher, show to this Honorable Court, that they are the defendants and all the defendants in this suit, which is of a civil nature, and, that the matter and amounts in dispute in this case exceeds the sum or value of two thousand ($2,000.00) dollars, exclusive of interests and costs, and, that the controversy herein is between citizens of different —; that the plaintiff Wm. H. Knight was at the time of the commencement of this suit and still is a citizen of the

4 State of Louisiana, residing at Rosepine, Vernon Parish, in said state. That the plaintiff, John A. Knight was at the time of the commencement of this suit and still is a citizen of the State of Louisiana, residing at De Ridder, Calcasieu Parish, said state; that the plaintiff, Miss Stella Knight & Mrs. Florence Knight, wife of James Durham, and James Durham were each and all at the time of the commencement of this suit and still are citizens of the State of Louisiana, each and all residing at Leesville, said state.

That your petitioners, The Lutcher & Moore Lumber Company was at the time of the commencement of this suit and still is a citizen of

the State of Texas, and of no other state, residing in the City of Orange, in said state; and, that your petitioner, Henry J. Lutcher was at the time of the commencement of this suit and still is a citizen of the State of Texas, and of no other state, residing in the City of Orange, in said state; and, that neither of your petitioners are now nor were they ever a citizen or resident of the State of Louisiana.

That your petitioners desire to remove this suit before the trial thereof into the Circuit Court of the United States, Western District of Louisiana, and your petitioners offer herewith a bond with good and sufficient surety for their entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court should hold that this suit was wrongfully or improperly removed thereto.

And your petitioners further pray this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States, in and for the Western District of the State of Louisiana, and they will ever pray.

HOLLAND & HOLLAND,
Attorneys for Petitioners.

THE STATE OF LOUISIANA,
Vernon Parish:

I, J. A. Holland, being duly sworn, do say that I am a member of the firm of Holland & Holland, the attorneys for the petitoners in the above entitled cause; that I have read the foregoing petition, and know the contents thereof, and that the staements and allegations therein contained are true, and I verily believe.

J. A. HOLLAND.

5 Subscribed by the said J. A. Holland, in my presence, and by him sworn to before me, this the 26th day of March, A. D. 1903.

J. J. HICKS,
Clerk of Court.

Filed March 26, 1903.

J. J. HICKS, *Clerk.*

Know all men by these presents, That, we, The Lutcher & Moore Lumber Company and Henry J. Lutcher, as principals, and Thomas C. Wingate, as sureties, are held and firmly bound unto Wm. H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight, wife of James Durham, and James Durham in the penal sum of five hundred ($500.00) dollars, the payment whereof well and truly to be made unto the said Wm. H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight, wife of James Durham, and James Durham heirs and assigns; we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions, the said The Lutcher & Moore Lumber Company and the said Henry J. Lutcher having petitioned the District Court of Vernon Parish, State of Louisiana, for the removal of a certain cause therein pending wherein Wm. H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight, wife of James Durham, & James Durham are plaintiffs, and the Lutcher & Moore Lumber Company and Henry J. Lutcher are defendants to the Circuit Court of the United States, in and for the Western District of Louisiana.

Now, if the said The Lutcher & Moore Lumber Company, and the said Henry J. Lutcher, your petitioners, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full f-rce and virtue.

Witness our hands and seals, this the 26th day of March, A. D. 1903.

THE LUTCHER & MOORE LUMBER COMPANY,
[L. S.] By HOLLAND & HOLLAND, *Ag'ts & Att'ys.*
[L. S.] H. J. LUTCHER,
[L. S.] THOS. C. WINGATE,
[L. S.] By HOLLAND & HOLLAND, *Ag'ts & Att'ys.*

6 Attest:

T. G. B. COX.
W. A. MOORE.

Filed March 26, 1903.

J. J. HICKS, *Clerk.*

Order for Removal.

No. —.

W. H. KNIGHT ET AL.
vs.
H. J. LUTCHER ET AL.

The defendants here rest*s*, having within the time provided by law filed this petition for removal of this case to the Circuit Court of the United States, for the Western District of Louisiana, and having at the same time offered his bond for $500, with Thos. C. Wingate, good and sufficient surety, pursuant to the statutes and conditions according to law. Now, therefore, this Court does hereby accept and approve said bond and send said petition, and does affirm that this case be removed for the time to the next Circuit Court of the United States, for the Western District of Louisiana, pursuant

to the statutes of the United States, and that all other proceedings of this Court be stayed.

(Signed) J. B. LEE, *Judge.*

[Indorsed:] W. H. Knight, *et als., vs.* H. J. Lutcher, *et als.* Order for Removal. Filed March 26, 1903. W. A. Winfree, Dy. Clerk.

Clerk 12th District Court, Vernon Parish, Louisiana, Leesville, La.

STATE OF LOUISIANA,
Parish of Vernon:

I, J. J. Hicks, clerk of the 12th Judicial District Court, in and for the Parish of Vernon, Louisiana, do hereby certify that the within and foregoing nine (9) pages is a true and correct copy of all the documents and papers filed, and the proceedings had in the case No. 533, of Wm. H. Knight, *et als., vs.* H. J. Lutcher & The Lutcher & Moore Lumber Co., on the docket of this Court.

7 Witness my official signature and seal at my office at Leesville, La., on this the 9th day of April, A. D. 1903.

[SEAL.] J. J. HICKS,
Clerk, 12th District Court,
Parish of Vernon, Louisiana.

Indorsed: No. 276. Wm. H. Knight, *et als., vs.* H. J. Lutcher, *et als.* Transcript from 12th Dist. Court, Vernon Parish, La. Filed March 11, 1903. J. J. Hicks, Clerk. Filed April 15th, 1903. E. C. Jackson, Dy. Clerk.

Default Against All Parties.

Minutes of Court, April 24th, 1903.

533.

WM. H. KNIGHT ET ALS.
vs.
H. J. LUTCHER ET ALS.

In the Circuit Court of the United States, for the Western District of Louisiana, at Shreveport.

In Law.

WILLIAM J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Now comes G. Bedell Moore made a party herein by the defendants, the Lutcher & Moore Lumber Co., by its first amended original

answer filed in this cause, and enters his appearance and adopts the first amended original answer of said defendants, and asks that his warrantors as set out in the defendants amended answer be cited to appear and defend this suit, and in case the defendants are evicted from any part of said land and judgment is obtained against him, he prays for a judgment against said warrantors, and for the taxes as set up in said amended answer of the defendants and for $500.00 attorneys fees incurred and paid herein and for all necessary orders for full and general relief.

DAVIS & WILLIAMS,
HOLLAND & HOLLAND,
Attorneys for Defendant, G. Bedell Moore.

Indorsed: No. 276. William J. Knight, *et al., vs.* The
8 Lutcher & Moore Lumber Company, *et al.* Original Answer of G. Bedell Moore. Filed Oct. 5th, 1903. E. C. Jackson, Dy. Clerk.

In the Circuit Court of the United States, for the Western District of Louisiana, at Shreveport.

In Law.

WILLIAM J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Now come the defendants in the above styled suit, and leave of the Court being first had and obtained, file this their first amended original answer in lieu of their original answer heretofore filed, and respectfully show:

I. That plaintiffs' petition discloses no right or cause of action against these defendants, and they pray that plaintiffs demands may be rejected at their costs, and for general relief.

II. Reserving the benefit of the above pleaded demurrer, should it be overruled, defendants deny generally and specially all the allegations contained in said petition, except what hereafter may be admitted.

III. They specially deny that plaintiffs' alleged father was ever married, except to the wife with whom he is now living, or that plaintiffs are the lawful heirs of any previous marriage.

IV. Defendants aver that the claims made by the plaintiffs herein are the alleged heirs of W. J. Knight, and his alleged previous wife, that the property herein sued for constitutes part of the community of acquets and gains of W. J. Knight and his alleged previous wife, is without foundation in fact or in law; but, defendants are informed and believe, and here allege the facts so to be, that the property sued for herein was the separate property of W. J. Knight, and that the same was a gift to him by his relative, Dan R. Knight and J. A. Lovett, the business partner of said Dan. R. Knight; that neither the community existing between W. J. Knight and his

alleged previous wife, nor W. J. Knight individually, paid
9 any consideration whatever for said property; that the cash consideration of $500.00 recited in act of sale between Dan R. Knight & John A. Lovett to W. J. Knight, was in fact not paid, and that the note of $1400 recorded in said act of sale was never executed by W. J. Knight, that the same was never paid and said note in fact never did exist, but, that said transfer of said property was a gift to W. J. Knight, and that the same was his separate property.

V. And defendants further allege that the title to said property was never in W. J. Knight, except as trustee for Dan R. Knight and J. A. Lovett; that at the time of and prior to the sale from said Dan R. Knight and J. A. Lovett to said W. J. Knight, on July 28, 1882; there was an agreement between the parties that said W. J. Knight should hold the title to said property as trustee, and for the benefit of said Knight and Lovett, and said W. J. Knight agreed at and prior to said sale that he would convey said land to Knight and Lovett, or their assigns whenever they directed or requested him to do so; that said W. J. Knight, paid Knight and Lovett nothing whatever for said land, and that he never executed any note therefor, but he, the said W. J. Kni[illegible] accepted said trust, and in pursuance of said agreement said property was conveyed to him. That afterwards, on April 13, 1889, at the special instance and request of said Dan R. Knight and J. A. Lovett, or at the special instance and request of Dan R. Knight, who had paid said J. A. Lovett for his interest in said land, and in furtherance of and complying with the terms of said agreement so to do, said W. J. Knight conveyed the title to said land to said H. J. Lutcher and G. Bedell Moore. That said sale to Lutcher & Moore was made at the request and under the direction of Dan R. Knight and J. A. Lovett, or one or both of them, and they received the consideration therefor, and that, therefore, said property and the title thereto, being received by said W. J. Knight charged with said trust, the community of acquets and gains existing between him and his alleged previous wife, had no interest in said property, and the plaintiffs herein acquired no interest in said property through their said alleged mother.

VI. That on April 13, 1899, the time of the sale of said lands by W. J. Knight to Lutcher & Moore, said W. J. Knight was married
10 to his present wife, and there was no evidence of record of a previous marriage or of the death of the alleged previous wife; that all of the sales effecting said land was duly and seasonably recorded in the proper books in the Parishes where the lands were located, and that so far as these defendants are concerned, said sales were executed in perfect good faith for valuable considerations duly paid, and with no notice or knowledge of any of the claims herein made; that said defendants had no knowledge whatever of any previous marriage of said W. J. Knight, or of the death of his alleged wife, and they had a right to rely as they did upon the faith and verity of the public records in the Parishes where the lands were located.

VII. And, if, the defendants are required further to answer

herein, they allege that the sale made by Dan R. Knight and John A. Lovett to W. J. Knight dated July 28th, 1882, and recorded in Book D, of the conveyances in Vernon Parish, records on pages 17 and 18, was never intended by any of the parties thereto, either then or after, to convey the real right or title in or to the property purported to have been conveyed and which is herein sued for; that no money belonging to said W. J. Knight or of the alleged community was ever paid to the vendors, and that no note or other obligations was ever in fact executed, or in fact received, and that said alleged note was never paid to any one. That said Dan R. Knight and John A. Lovett, at the time of said pretended sale, were engaged as partners in the mercantile and logging business in said Vernon Parish, Louisiana, and becoming financially embarrassed, they made said pretended sale for the sole purpose of screening and hiding said property from the pursuit of their creditors; that said property never became the property of said W. J. Knight or the alleged community, but always belonged to said Dan R. Knight and John A. Lovett, who never became divested of their possession or control of said property, until the sale made April 13, 1889, by W. J. Knight, John C. Knight and Viola P. Knight, to Henry J. Lutcher and G. Bedell Moore; that said Henry J. Lutcher and G. Bedell Moore bought the paper title held by said W. J. Knight, because he was the record holder of the title, but said W. J. Knight, and his alleged previous wife, and said Dan R. Knight and John A. Lovett knew at said time that said property still belonged to said Dan R. Knight and J. A. Lovett, and that the pretended same [sale] made July 28, 1882, to said W. J. Knight was a simulation and a fiction. That all the parties to said sale were very closely related, and that the proceeds of the sale to Henry J. Lutcher and G. Bedell Moore were divided between said Dan R. Knight and J. A. Lovett,
11 and that said last named parties advised, counseled and procured the said sale made to said Henry J. Lutcher and G. Bedell Moore, and that they reaped the benefits of the purchase price, and that their title has been validly conveyed to these defendants.

VIII. That defendant, Henry J. Lutcher is the owner in good faith of one undivided one-half interest in and to the property sued for herein, and that the Lutcher & Moore Lumber Co. is the owner of the other undivided one-half interest, except that neither party claims the N. 1/4 of N. W. 1/4, Sec. 23, T. 2, S. R. 11, W. That the Lutcher & Moore Lumber Co. bought of G. Bedell Moore, the one-half interest aforesaid with other lands, by act of sale April 31, 1901, and recorded in Calcasieu and Vernon Parishes, the latter record being found in Conveyance Book No. 1, page 1, *et seq.*, of the records of said Vernon Parish, and that said Co. is entitled to call in warranty said G. Bedell Moore, who lives in Bexar County, Texas, to defend*ant* this suit. That Henry J. Lutcher is entitled to call in warranty his vendors, W. J. Knight and John C. Knight, who reside in Vernon Parish, Louisiana, and Viola P. Knight, and her husband, Dan R. Knight, who reside in Natchitoches Parish, Louisiana, to defend his title in this suit, and in case of eviction from any

of the lands sued for herein said defendants are entitled to recover judgment against their respective vendors for the amount paid by them for said lands with five per cent. interest per annum from date of payment. That these defendants have paid in taxes since their said purchase, the sum of one thousand dollars, for which they should be reimbursed, if they are evicted from said lands.

Wherefore, defendants pray that plaintiffs' demands may be rejected at their costs by judgment in favor of defendant forever quieting said defendants in the ownership and possession of all of said lands, as by them acquired. But should the Court hold that plaintiffs are entitled to recover any of said lands, then defendants pray that they may have a judgment in their favor against all of the plaintiffs for the sum of one thousand dollars, being their proportion of the taxes paid by said defendants on said lands, and that said amount be declared a lien on said land. And defendants further pray for citation to G. Bedell Moore, W. J. Knight, John C. Knight and Viola P. Knight, and her husband, Dan R. Knight, and in the event the plaintiffs recover any of said lands defendants pray for a judgment against their respective warrantors for their proportionate amount of the purchase price
12 paid by said defendants to the parties herein called in warranty for the premises from which defendants may be herein evicted, with five per cent. per annum interest thereon from date of payment, and the sum of $1000.00 lawyers' fees incurred and paid in defending this suit, and for costs and all necessary orders for full and general relief.

HOLLAND & HOLLAND,
DAVIS & WILLIAMS,
Attorneys for Defendants.

Indorsed: No. 276. William J. Knight, *et al.*, *vs.* The Lutcher & Moore Lumber Company, *et al.* Defendants First Amended Original Answer. Filed Oct. 5th, 1903. E. C. Jackson, Dy. Clerk.

In the Circuit Court of the United States, Holding in and for the Western District of La., at Shreveport.

In Fifth Circuit for Western District of La., at Shreveport, Louisiana.

No. 276.

WILLIAM J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Now comes the plaintiff, by counsel, and demurs to that portion, if the defendants answer that in any way attacks the sale from Knight & Lovett, to W. J. Knight, of date July 28th, 1882, and moves and prays the Court to strike out that portion of the defendants' answer for the following reasons:

1st. The defendants, claiming title from W. J. Knight and Viola

Knight and J. C. Knight, both of whom bought from W. J. Knight, *et al.*, after sale, of sale of July 28, 1882, estopped from attacking the title of W. J. Knight, since they trace whatever title they have back to W. J. Knight, who received his title by virtue of the sale of July 28th, 1882, from Knight & Lovett.

2nd. That the question of the reality or simulation of said sale has already been passed upon in the suit of McIlhenny & Co., *vs.* D. R. Knight, *et als.*, (which was Knight & Lovett), and W. J. Knight, intervener, being No. 60, in the 12th District Court
13 of the State of La., holding in and for the Parish of Vernon, wherein all these parties were made parties, and where said sale of date July 28, 1882, was declared by the judgment in said suit to be a *bona fide* sale and not a simulation, which judgment is *res adjudicata*, as to said sale.

3rd. The defendants, not claiming to be creditors, nor relying on any deed from D. R. Knight or J. A. Lovett, or Knight & Lovett, show no interest or right to attack the said sale as simulated or otherwise.

Hence plaintiffs pray that portion of the defendants' answer which attacks the sale of July 28th, 1882, from Knight & Lovett, to W. J. Knight, be stricken from the defendants' answer, and he be confined to their other allegations in their petition. For all orders and general relief.

M. J. CUNNINGHAM, JR.,
MURFF & WEBB,
Atty's Plaintiffs.

Indorsed: William H. Knight, *et al.*, *vs.* Lutcher & Moore Lbr. Co. *et al.* Motion to strike out & plea of estoppel & *res adjudicata* Filed Oct. 22nd, 1903. W. Jackson, Clerk.

In the Circuit Court of the United States, for the Western District of Louisiana, at Shreveport.

WILLIAM J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

In the above entitled cause, now comes the defendant and for the purpose of filing their amended answer with leave of the Court, first had and obtained respectfully show:

That said act of sale from Knight & Lovett, to W. J. Knight, included all the property belonging to Knight & Lovett, at said time, both movable and immovable, and the agreement was that W. J. Knight should act as the agent or manager of the business and property of Knight & Lovett, and was to receive for his service a salary; that said W. J. Knight agreed to convert said movable property into money and turn over the proceeds to Knight & Lovett, and further agreed at said time to recover to Knight & Lovett, the lands
14 sued for herein whenever said Knight & Lovett should desire him to do so, as aforesaid. That in pursuance of said agree-

ment and in compliance with the terms thereof, said W. J. Knight did convert said movable property into money and delivered to Knight & Lovett, the proceeds thereof; and that said W. J. Knight during all of said time recognized said Knight and Lovett as the owners of all of said property, and never at any time repudiated said agreement; that in the early part of 1887, said W. J. Knight offered to reconvey said lands to Knight & Lovett, and on Fe-ruary 5, 1887, he did convey to Viola P. Knight, the wife of Dan R. Knight, said Dan R. Knight's one-half interest in said lands, the act of sale being authorized by said Dan R. Knight. That at said time, J. A. Lovett did not want his half interest conveyed to him, but wanted to sell the same and did sell it at said time to W. J. Knight, they each taking one-half of his one-half and paying said J. A. Lovett therefor about the sum of one dollar per acre. That in pursuance of said sale, W. J. Knight, on the 7th day of February, 1887, conveyed a one-fourth interest in all of said lands to J. C. Knight, and kept title to a one-fourth interest for himself and that this was the first time said W. J. Knight ever acquired the real title to or any real interest in said lands. That the $500.00 recited in said act of sale of July 28, 1882, to have been paid by W. J. Knight, to Knight & Lovett, was in fact the money of Knight & Lovett; that the note of $14500.00, also recited in said act of sale was executed by W. J. Knight and delivered to Knight & Lovett, but the same was never paid by W. J. Knight, to Knight & Lovett, or to anyone else, and it was never the intention of the parties that it should be paid, but the said note was afterwards re-delivered to W. J. Knight without his ever having paid any part of it, and, therefore your defendants plead and say that the recital in said deed from Knight & Lovett, to W. J. Knight, aforesaid, that the purchase price of fifteen thousand dollars was paid in cash was error and untrue in fact, as no part of said purchase price was then paid or ever afterwards paid by the said W. J. Knight, or by any one acting for him, and in fact and in truth such sale to him was and constituted only a paper title to him of said property and same never in fact nor in law became the property of the community between him and his said so-called wife, and no interests whatever in said property vested in said community, and the said plaintiffs herein are without right or equity to any right, title or interest in said lands.

Your defendants further plead in bar of plaintiffs' right to recover the prescription of one, two, four, five and ten years.

15 Wherefore, defendants pray that plaintiffs' demands be rejected at their cost, but in the event of their eviction for judgment against their warrantors as prayed for in their answer herein and for all orders and decrees, for cost and general relief.

MASON WILLIAMS,
HOLLAND & HOLLAND,
ALEXANDER & WILKINSON,
Attorneys.

Indorsed: No. 276. Wm. J. Knight, *et al.*, *vs.* Lutcher & Moore. Amended Answer. Filed Oct. 27th, 1903. W. Jackson, Clerk.

In the Circuit Court of U. S., Western District of Louisiana.

No. 276.

WILLIAM H. KNIGHT ET AL.
vs.
H. J. LUTCHER ET AL.

Now comes the plaintiff, William H. Knight, *et al.*, by counsel and shows to the Court that by virtue of a decision of the United States Court of Appeals, Fifth Circuit Louisiana, rendered on April 4th, 1905, in the above styled cause, it was held by said Court of Appeals that the Circuit Court of the United States, Western District of Louisiana, had no jurisdiction of said cause under the pleading. That in accordance with said decision by said Court, a mandate has issued therefrom directed to the Honorable Circuit Court of the United States, holding — and for the Western District of Louisiana, ordering and commanding it to proceed according to law, and in accordance with the opinion expressed in the decree, all of which may be seen by the certified copy of the opinion of the Honorable Court of Appeals in and for the Fifth Circuit, together with a mandate from said Court, directed to this Honorable Court, which opinion and mandate is on file in your Honor's Court, and, which is attached hereto and made a part hereof.

He shows that under said decree and mandate, this case should be remanded to the State Court, to be proceeded with according to law.

Hence, plaintiff prays that an order issue from your Honor, ordering the clerk of your Honorable Court to remand said
16 cause to the State Court, of Louisiana, holding in and for Vernon Parish, and to issue a mandate to said Court in accordance with the order of the United States Court of Appeals.

He prays for all orders and general relief.

A. J. MURFF &
M. J. CUNNINGHAM, JR.,
Att'ys for Plaintiff.

Indorsed: No. 276. William H. Knight, *et al.*, *vs.* Lutcher & Moore Lumber Co. Motion to have case remanded to State Court. Filed Nov. 28th, 1905. W. Jackson, Clerk.

In the United States Circuit Court, Western District of Louisiana.

No. 276.

WM. J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

In the above matter, now comes the defendants and shows unto the Court, that an informal order or entry was made on the minutes

in this cause on this morning remanding this cause to the State Court. That such order or entry, was made in the absence of this counsel from the Court room, and without their knowledge or any notice to them of the intention to apply therefor. That defendants notified the counsel representing plaintiffs, that they would apply for leave to amend their petition for removal in this Honorable Court as soon as the decree from the Circuit Court of Appeals was returned to this Court. That said decree was received by counsel for plaintiff-, and only filed in this Court on this morning and immediately, without any notice to defendants or their attorneys, such entry or order to remand was procured from this Court. That such order to remand was improperly granted and should be set aside, and your defendant-files herewith their motion to amend the petition for removal.

Wherefore, they pray that said entry, or order to remand to the State Court, be set aside, and that their petition to amend be allowed, and for cost and general relief.

ALEXANDER & WILKINSON,
Att'ys for Defendants.

17 J. D. Wilkinson being by me duly sworn, says that he is one of the attorneys for the defendants in the above case, and that the facts stated in the foregoing application are true.

J. D. WILKINSON.

Sworn to and subscribed before me on this 28th day of November, 1905.

D. T. LAND,
Notary Public.

Indorsed: No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lbr. Co. *et al.* Motion to set aside order to remand. Filed Nov. 28th, 1905. W. Jackson, Clerk.

In the Circuit Court of the United States for the Western District of Louisiana, at Shreveport.

In Law.

WILLIAM H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER COMPANY ET AL.

To Mr. M. J. Cunningham & Messrs. Murff & Webb, Attorneys for Plaintiffs:

Please take notice that we shall make a motion before the Judge of the Circuit Court of the United States, for the Western District of Louisiana, at Shreveport, on the 28th day of Nov., 1905, at 12 o'clock in the forenoon or as soon thereafter as counsel can be heard, that the defendants in this cause have leave to amend the petition to remove this cause from the District Court of Vernon Parish, Louisiana, filed

erein, on such terms as the said Court may direct; a copy of which notion with the amendment and affidavit in support thereof, which ill be presented to the Court at such hearing, are herewith served pon you.

HOLLAND & HOLLAND,
ALEXANDER & WILKINSON,
MASON WILLIAMS,
Counsel for Defendants.

Shreveport, Louisiana, — day of ——, 1905.

Services accepted this 28th day of Nov., 1905.

A. J. MURFF,
Counsel for Plaintiff.

8 In the Circuit Court of the United States for the Western District of Louisiana, at Shreveport.

No. 276. In Law.

WILLIAM H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER COMPANY ET AL.

Now comes the defendants and move the Court to allow them to mend the third paragraph of their petition to remove this cause rom the District Court of Vernon Parish to this Court.

The third paragraph of this petition now reads as follows: "That our petitioners, the Lutcher & Moore Lumber Company, was at the ime of the commencement of this suit, and still is a citizen of the State of Texas, and of no other State, residing in the City of Orange, n said State; and that your petitioner, Henry J. Lutcher, was, at the ime of the commencement of this suit, and still is a citizen of the State of Texas, and of no other State, residing in the City of Orange, n said State; and that neither of your petitioners are now, nor were hey ever, a citizen or resident of the State of Louisiana."

That your petitioners, the defendants herein, desire to amend said paragraph so that hereinafter it may read as follows: "That your petitioner, the Lutcher & Moore Lumber Company, was at the time of the commencement of this suit, and still is a corporation organized and existing under and by virtue of the laws of the State of Texas, and of no other State, residing and having its domicile in the City of Orange, in said State; that your petitioner, Henry J. Lutcher, was at the time of the commencement of this suit, and still is a citizen of the State of Texas, and of no other State, residing and having his domicile in the City of Orange, in said State; and that neither of your petitioners are now, nor were they ever citizens or residents of the State of Louisiana."

HOLLAND & HOLLAND,
ALEXANDER & WILKINSON,
MASON & WILLIAMS,
Counsel for Defendants.

STATE OF TEXAS,
County of Bexar:

Before me, the undersigned authority, on this day personally appeared Mason Williams, known to me, who, being by me duly sworn, on oath states:

19 That he is one of the counsel for defendants in the above styled cause, and that he has read the amendment as set out above in the petition to remove this cause from the State Court, and that he is personally acquainted with the facts stated therein, and that the facts set forth in said amendment are true.

MASON WILLIAMS.

Sworn to and subscribed before me this the 15 day of November, A. D. 1905.

[SEAL.] HENRY C. KING, JR.,
Notary Public, Bexar County, Texas.

(Indorsed:) No. 276. Wm. H. Knight, *et al., vs.* Lutcher & Moore Lbr. Co., *et al.* Motion for leave to amend petition for removal. Filed Nov. 28th, 1905. W. Jackson, Clerk. Filed Feb'y 21st, 1906. W. Jackson, Clerk.

In the Circuit Court of the United States for the Western District of Louisiana.

No. 276.

WILLIAM H. KNIGHT ET AL.
vs.
LUTCHER-MOORE LUMBER CO. ET AL.

Be it remembered, that in the above cause, the United — Circuit Court of Appeals, in and for the Fifth Circuit, holding in and for the State of Louisiana, at New Orleans, on April 4th, 1905, rendered an opinion in the above styled cause which was pending before it, on appeal from the Circuit Court *from* the Western District of La., holding at Shreveport, La., wherein it is decreed that the said Circuit Court of the United States, in and for the Western District of La., had no jurisdiction of said cause, but that same properly belonged in the State Court, and ordering said cause sent back to said Court with instructions to proceed according to law. That while said cause was on its way back to the State Court, and while pending in said Circuit Court of Western District La., awaiting orders from said Court to send said record back to State Court, counsel for defendant filed a document purporting to be an amendment to the petition of removal.

To which filing counsel for plaintiff objected, for the reason that the Circuit Court had no jurisdiction, except to remand same to State Court, as directed by Circuit Court of Appeals, and that

20 an amendment to the petition of removal could not be filed and allowed in Circuit Court.

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Which objection was overruled by the Court and the amendment allowed and the case reinstated in Circuit Court for the following reasons.

To which counsel for plaintiff- excepted and reserved this bill, which has been submitted to counsel for defendant- and which he asks the Court to sign, that it may be filed and made a part of the record in this case, which has been done.

ALECK BOARMAN, *Judge.*

I acknowledge notice of foregoing bill of exception.

J. D. WILKINSON,
Attorney for Defendant-.

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher-Moore Lumber Co., *et al.* On motion to amend bill of exception. Filed Feb'y 23rd, 1906. W. Jackson, Clerk.

United — Circuit Court, Western District La.

No. 276.

WILLIAM H. KNIGHT ET AL.
vs.
LUTCHER-MOORE LUMBER CO. ET AL.

Now comes the plaintiff in the above styled cause, and before going to trial and specially reserving all rights and exceptions heretofore filed, further excepts to the jurisdictions of this Court and makes a part hereof the judgment and mandate lately rendered in said cause by the United States Circuit Court of Appeals, on April 4th, 1905, at New Orleans, La., holding in and for said District.

Therefore they pray that the Court sustain this motion and remand the case to the State Court for further proceedings and in accordance with the opinion of the Circuit Court of Appeals.

M. J. CUNNINGHAM,
A. J. MURFF,
Att'ys — Plaintiff.

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lumber Co., *et al.* Exception to jurisdiction. Filed March 6th, 1906. W. Jackson, Clerk.

21 U. S. Circuit Court.

No. 276.

W. J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO. ET AL.

In the above case now comes the defendants and shows unto the Court that they cannot go to trial at this time, because one of their

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witnesses, Dr. Lovett, is absent from the State, who is a material and competent witness in their behalf. That they have used due diligence to secure the attendance of said witness, and have been unable to secure his presence at the trial. That when the case was fixed for trial the said Lovett was notified thereof and requested to be present at the trial, and promised to do so, as will appear by copies of letters and telegrams hereto annexed and made part hereof. That defendants did not have time to secure the depositions of said witness and did not have him summoned because he lived out of the State and beyond the process of this Court.

That if said Lovett was present he would swear that the sale from Knight & Lovett to W. J. Knight was made without any consideration being paid therefor; that the five hundred dollars mentioned in said act of sale was not the money of W. J. Knight, but was that of Knight & Lovett, who loaned it to him for the sole purpose of making said payment appear real; that the $14,500 note was never paid by W. J. Knight, nor was it intended to be paid by the parties to said sale; that the agreement was at the time of said sale that said W. J. Knight should hold said land as the agent or trustee of Knight & Lovett, and that whenever he made any sales thereof that the amount received from such sales should be paid to Knight & Lovett; that in pursuance thereof he conveyed to Viola P. Knight, wife of Dan R. Knight, a member of the firm of Knight & Lovett, a portion of said land receiving no consideration therefor from her, but the sale to her was in consummation of the original agreement between said firm and said W. J. Knight; that the other sales made by him were in pursuance of said original agreement and the proceeds thereof were paid to the members of said firm, according to their interest; that W. J. Knight finally concluded to keep a portion of said land after the death of his wife, or woman claimed as his wife, and then paid for it after the death of his so-called wife. The said Lovett would further testify that said sale to W. J. Knight was for the purpose of conferring on him the widest powers of agency for
22 the firm of Knight & Lovett, of which firm said Dr. Lovett was the junior member, and that it was not made for the consideration named in said act of sale.

Defendants further show that said evidence is material and said witness is competent, and without which they cannot go to trial. That this motion is not made for a delay but in order to secure substantial justice, as the testimony of said witness can be secured by the next term of Court.

Wherefore they pray that said cause be continued until the next term of Court, and for general relief.

GEO. E. HOLLAND,
MASON WILLIAMS,
J. D. WILKINSON,
Attorneys.

J. D. Wilkinson, Mason Williams and Geo. E. Holland, each being by me duly sworn, depose and say that all of the defendants in the above cause are absent from the State at this time, and that they

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are the attorneys for all of said defendants, and that all of the facts set forth and allegations made in the foregoing application are true and correct, to the best of their knowledge, understanding and belief.

Sworn to and subscribed before me this the 6th day of March, 1906.

GEO. E. HOLLAND.
MASON WILLIAMS
J. D. WILKINSON.

W. JACKSON,
Clerk U. S. Circuit Court.

J. H. Tucker & Co., P. O. Box 124.

DAYTON, TEXAS, *Nov.* 9, 1905.

Mr. Mason Williams, San Antonio.

DEAR SIR: I have been at the Fair at Dallas and found yours of 3rd inst. I will attend Court for you if you need me.

Respectfully yours,

J. H. LOVETT.

(Indorsed:) Filed March 6/06. W. Jackson, Clerk.
Filed March 6/6.

23 FEB. 26TH, 1906.

Dr. J. A. Lovett, Liberty, Texas.

DEAR SIR: The case of Knight *vs.* Lutcher and Moore is -et for Monday, March the 5th, in Shreveport. Will you please telegraph me on receipt of this letter that you will meet me there next Monday morning, March 5th. I will be at the Caddo Hotel. We will pay expenses and for your time, which I suppose will be about the same as before.

Wire my expense.

Yours truly, —— ——.

(Indorsed.) Filed March 6/06. W. Jackson, Clerk.

FEBRUARY 27, 1906.

Dr. J. A. Lovett, Liberty, Texas.

DEAR SIR: I *write* [wrote] you yesterday about the case of Knight *vs.* Lutcher & Moore being set for Monday, March 5th, at Shreveport, which is next Monday. I was expecting a wire from you to-day, but have not yet heard from you. Please wire me, upon receipt of this letter, at my expense, that you will meet me at the Caddo Hotel on Monday morning. I expect to leave here in a day or two myself, to go into that country, and would like to have your wire before I leave. Of course, I will pay your expenses and for your time. I suppose the amount will be about the same as it was before.

Thanking you in advance for answering this by wire, I beg to remain,

Yours truly, —— ——.

(Indorsed:) Filed Mch. 6/06. W. Jackson, Clerk.

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The Western Union Telegraph Company.

Received at ——. 12 collect.

LIBERTY, TEXAS, *Feb.* 28/06.

Mason Williams, S. A.:

I will meet you in Shreveport Monday morning, March 5th.

J. A. LOVETT.

(Indorsed:) Filed Mch. 6/06. W. Jackson, Clerk.

24 Shreveport, La.:

Yours date Lovet sined Williams undld not at Liberty, Texas.

Liberty, Tex., Mar. 5/06.

(Indorsed:) Filed March 6/06. W. Jackson, Clerk.

Western Union Telegraph Company.

106 Dars. cy. 11 Collect 733 P. M.

LIBERTY, TEXAS, *M'ch 5th*/06.

Geo. E. Holland, Care Caddo Hotel, Shreveport, La.

Learn that Dr. Lovett left here Saturday morning for Shreveport.

E. B. PICKETT, JR.

(Indorsed:) Filed M'ch 6/06. W. Jackson, Clerk.

(Indorsed:) No. 276. W. J. Knight, *et al., vs.* Lutcher & Moore Lbr. Co., *et al.* Motion for a continuance. Filed March 6th. W. Jackson, Clerk.

United — Circuit Court, Western District La.

No. 276.

W. H. KNIGHT ET AL.

vs.

LUTCHER-MOORE LUMBER CO. ET AL.

Be it remembered, that on March 6th, when the above styled cause was called for trial, the plaintiff filed a motion to dismiss the suit for the reason that this Court had no jurisdiction of the cause and made a part of said motion the judgment and mandate lately rendered in said cause of the United States Circuit Court of Appeals, on April 4th, 1905, at New Orleans, holding in and for said District, and prayed that said suit be dismissed, and that the case be remanded to the State Court, in accordance with the opinion of the Circuit Court of Appeals, which said motion and exception was overruled by the Court for the following reasons:

To which ruling of the Court counsel for plaintiff excepted and reserved this bill of exception, which, after having submitted the same to the opposing counsel, he asked the Court to sign, that it might be and become a part of the record in this case.

ALECK BOARMAN, *Judge.*

O. K.
J. D. WILKINSON.

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lbr. Co., *et al.* Plaintiff's bill of exceptions. Filed March 7th, 1906. W. Jackson, Clerk.

U. S. Circuit Court, West. Dist. of La.

No. 276.

WM. H. KNIGHT ET AL.
vs.
H. J. LUTCHER ET AL.

In the above matter now comes defendants and shows unto the Court that they have had taken the evidence of Dr. A. J. Lovett under commission, which has been duly returned to this Court. That a rule should issue to the said plaintiffs to show cause, if any they have, why said d*is*positions should not be received, read and used in evidence on the trial of said cause.

Wherefore they pray that a rule do issue to said plaintiffs, requiring them to show cause before the day of trial in said cause why the deposition of said J. A. Lovett should not be read, used and filed in evidence on the trial of said case and for general relief.

ALEXANDER & WILKINSON.

Let the rule issue as prayed for and according to law. This Oct. 18th, 1906.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. Wm. H. Knight, *et al., vs.* H. H. Lutcher, *et al.* Motion and rule to show cause. Filed Oct. 18th, 1906. E. C. Jackson, Dy. Clerk.

26 In the U. S. Circuit Court in and for the Western District of Louisiana.

No. —

W. J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Now comes the plaintiff, by counsel, and in answer to defendant's rule to show cause why the depositions of J. A. Lovett should not be

received and used in evidence in the above styled cause, and offers the following objections to the introduction and use of said depositions.

1st. That one cannot be heard alleging his own turpitude.

2nd. Parole evidence cannot be introduced to prove title to real estate or to contradict or vary an authentic act; especially without allegations of fraud or error.

3rd. The plaintiff being estopped by the plea of *res adjudicata* cannot be heard to question the reality or simulation of the sale of July 28/1882.

4th. The testimony is not allowable under the pleadings of the plaintiff's petition for the reasons that the allegations do not justify the same.

Wherefore the plaintiff prays that the deposition be suppressed and not allowed to be introduced in evidence. He further prays for all orders and general relief.

M. J. CUNNINGHAM, Jr.
A. J. MURFF.

(Indorsed:) No. 276. In Circuit Court U. S. Wm. H. Knight, *et al., vs.* Lutcher & Moore Lumber Co., *et al.* Answer to rule to motion to suppress testimony of J. A. Lovett. Filed Oct. 23rd, 1906. W. Jackson, Clerk.

27 In the Circuit Court of the U. S., Holding in and for the Western District of Louisiana.

In Fifth Circuit for Western District of Louisiana, at Shreveport, Louisiana.

No. 276.

WILLIAM J. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Now comes the plaintiff, by counsel, and demurs to that portion of the defendant's answer that in any way attacks the sale from Knight & Lovett to W. J. Knight, of date July 28/1882, and moves and prays the Court to strike out that portion of defendants' answer for the following reasons:

1st. The defendants, claiming title from W. J. Knight and Viola P. Knight and J. C. Knight, both of whom bought from W. J. Knight after sale of *sale of* July 28/1882, are estopped from attacking the title of W. J. Knight, since they traced whatever title they have back to W. J. Knight, who received his title by virtue of the sale of July 28/1882, from Knight & Lovett.

2nd. That the question of the reality or simulation of said sale has already been passed upon in the suit of McIlhenny & Co. *vs.* D. R. Knight, *et al.* (which was Knight & Lovett), and W. J. Knight, intervenor, being No. 60, in the 12th District Court of the State of

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Louisiana, holding in and for the Parish of Vernon, wherein all these parties were made parties, and where said sale of date July 28/1882, was declared by the judgment in said suit to be a *bona fide* sale and not a simulation, which judgment is *re- adjudicata* to said sale.

3rd. The defendants not claiming to be creditors nor relying on any deed from D. R. Knight or J. A. Lovett, or Knight & Lovett, show no interest or right to attack the said sale as simulated otherwise.

Wherefore plaintiff prays that that portion of the defendants' answer which attacks the sale of July 28/1882, from Knight & Lovett to W. J. Knight, be stricken from the answer, for the reasons above set forth. He further prays that his plea of estoppel, which he specially pleads, and his plea of *res adjudicata* as to the simulation *rel non* of the sale of July 28/1882, which he specially pleads be sustained.

28 He prays for all orders and general relief.

M. J. CUNNINGHAM, Jr.
A. J. MURFF.

(Indorsed:) No. 276. In Circuit Court U. S., Western Dist. La. W. H. Knight, *et al., vs.* Lutcher & Moore Lumber Co., *et al.* Plea of Estoppel and *res adjudicata*. Filed Oct. 23rd, 1903. W. Jackson, Clerk.

U. S. Circuit and District Court for Western District of La.

No. & —.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO.

Evidence taken on the trial of the above numbered and entitled cause on trial before Hon. Aleck Boarman, Judge of said Court, and a jury of twelve good and lawful jurors, who were first duly sworn, trial commencing on Oct. 31st, 1906.

Appearances.

A. J. Murff, Jeo Cunningham & M. C. Elstner, attorneys for plaintiff; Alexander & Wilkinson, Davidson & Willams, and Holland & Holland, attorneys for defendant.

Evidence reported by R. B. Cook, stenographer, at request of both Plaintiff and Defendant.

Plaintiff's Evidence.

W. H. SMART, witness for the plaintiff, being first duly sworn, testified as follows:

On direct examination he said:

Q. Mr. Smart, you live in Vernon Parish?
A. Yes, sir.

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Q. How long have you lived there?
A. Ever since the formation of the Parish.
Q. About how long?
A. Since 1870 or 1871.

Q. Do you know W. J. Knight?

29 A. Yes, sir; I have known him ever since he was a little kid.

Q. Mr. Smart, what official position did you hold in Vernon Parish from 1875 to 1880?
A. Clerk of the District Court.
Q. Do you remember the occasion of W. J. Smart [Knight] applying to you for license to get married?
A. Yes, sir; I do.
Q. You remember the circumstance of issuing that license?
A. Yes, sir.
Q. To whom were the license issued for him to marry?
A. Miss Mary Cain.
Q. You issued the license to him?
A. Yes, sir.
Q. In those days were licenses returned to the Clerk's office?
A. No, sir; hardly ever. Once and a while they were.
Q. They kept no record of them in those days?
A. No, sir; no book was furnished until 1887 or 1888 or 1889.
Q. Now, what impresses you with the fact that you issued the license to Knight to marry Mary Cain?
A. Well, I loaned Knight my mare to steal the young lady. Her parents would not give her up, and he was a friend of mine and I liked him and his wife, and he came and asked me for the use of my mare, a saddle animal; said that he was going to steal Miss Mary, and I says all right, you can have her. He says I would like for you to send the license to Nathaniel S. Williams, Justice of the Peace of Ward Four.
Q. They lived in your neighborhood for a number of years?
A. Knight lived about twenty miles from us, but he previously lived five or six miles of us.
Q. He lived there in the same parish?
A. Yes, sir.
Q. Do you remember the names of the children?
A. Yes, sir; they had four children.
Q. Do you know the names of the children?
A. I think that I do; there was W. H. Knight, Florence, Johnny and Stella or Estelle.
Q. Have you been to their house at various times?
A. Yes, sir.
Q. You saw the children there?
A. Yes, sir; stayed all night there about twice with them and eat dinner there several times.

30 Q. Then state whether or not these plaintiffs in this case here are the children of W. J. Knight and Mary Cain Knight?

A. Yes, sir; they were their children, they always claimed to be and they were there on the place.
Q. Was it ever questioned in that parish that you ever heard of?
A. No, sir.

On cross-examination he said:

Q. Mr. Smart, you know W. J. Knight quite well?
A. Yes, sir; have known him since he was a boy.
Q. What property did he have when you knew him?
A. When I first knew him he had nothing, but then after he become of age——

JOHN CONWAY, witness for the plaintiff, being first duly sworn, testified as follows:

On direct examination he said:

Q. Did you know W. J. Knight?
A. Yes, sir.
Q. Where did you know him?
A. The first time I got acquainted with him was about a month before he married.
Q. Where?
A. He was married at Elmwood Post Office, now; did not have any Post Office there then.
Q. When was it that they were married?
A. I think that it was in 1875.
Q. Well, what have you to refresh your memory as to that?
A. I was married in 1871, my wife died in 1872, and I came back there and was there two or three years when he married.
Q. Were you present at his marriage?
A. Yes, sir.
Q. Who married them?
A. Nathaniel Williams, Justice of the Peace.
Q. Who did he marry?
A. Miss Mary Cain.
Q. You knew them both before that, before they married?
31 A. No, sir; I did not know her at the time.
Q. You knew them afterwards?
A. Yes, sir.
Q. Do you know Wm. H. Knight, his son?
A. Yes, sir; knew him when he was a child.
Q. And John A. Knight?
A. Yes, sir.
Q. Miss Stella Knight?
A. Yes, sir.
Q. Florence, wife of Duncan [Durham]?
A. Yes, sir.
Q. They were the children of W. J. Knight and Mary Cain Knight?
A. Yes, sir?
Q. Do you know when Mrs. Knight died?
A. I think that she died, I will not be positive, but I think she died

just before I was married the second time, in 1885. I think that she died the last of July or the first of August; between that and the middle of August.

Q. 1885?

A. Yes, sir.

Q. Do you remember that that was about the time that she died?

A. Yes, sir.

Q. Either July or August, 1885?

A. Yes, sir; in August I was living down there, worked at Allen, and they brought the news of her death, I was up at Robeline.

Q. Who witnesses, if you remember, the marriage certificate? The marriage ceremony?

A. Well, I witnessed it, and I think, I am not positive, I think a young lady by the name of Miss Trure.

Q. You remember witnessing it?

A. Yes, sir; I remember witnessing it myself, and she was the only one outside of Williams' family that was present.

Q. You were not sure whether she witnessed it or not?

A. No, sir.

Q. You remember that you witnessed it?

A. Yes, sir.

Q. You have known them ever since?

A. Yes, sir; they lived in about four or five miles of me for several years and afterwards I moved off in another neighborhood, and then I knew them from that time to 1886, then moved from there.

Q. Did you ever hear their marriage questioned down there at all?

32 A. No, sir; never knew anything about it being questioned until Mr. Cunningham wrote me, inquiring about it. Knew nothing about the suit.

On cross-examination he said:

Q. The W. J. Knight, who you spoke of, is the same W. J. Knight who was here in the Court room a while ago.

A. Yes, sir.

Q. Sitting over there a while ago?

A. Yes, sir.

Q. He is the father of these children?

A. Yes, sir.

Q. The same man that was here in the Court room a moment ago?

A. Yes, sir.

Q. He is outside there now?

A. Yes, sir.

W. H. CAIN, witness for the plaintiff, being first duly sworn, testified as follows:

On direct examination he said:

Q. Mr. Cain, where do you live?

A. Vernon Parish, Louisiana.

Q. Do you know W. J. Knight?

A. Yes, sir.

Q. Did you know Miss Mary Cain?
A. Yes, sir.
Q. How was she related to you?
A. She was my sister.
Q. What do you know of the marriage of W. J. Knight and Miss Mary Cain, your sister?
A. Well, my understanding was that they were legally married, although I did not see it.
Q. He ran away with her?
A. Yes, sir.
Q. You have lived there in the neighborhood ever since, around about them?
A. Yes, sir.
Q. Have you ever heard their marriage question [questioned] until it was brought up in this suit?
A. No, sir; never did.
Q. When were they married?
33 A. They were married in 1875, July, as well as I remember.
Q. Now, do you remember when your sister died?
A. Yes, sir.
Q. When?
A. She died in 1885, about August 7th.
Q. Well, you know W. H. Knight?
A. Yes, sir.
Q. John A. Knight?
A. Yes, sir.
Q. Stella Knight?
A. Yes, sir.
Q. Mrs. Florence Knight, wife of Jim Durham?
A. Yes, sir.
Q. They are the plaintiffs in this suit?
A. Yes, sir.
Q. Were they the issued [issues] of the marriage of W. J. Knight and your sister, Mrs. Mary Cain?
A. Yes, sir.

No cross examination.

Counsel for plaintiff offered in evidence original deed from Knight & Lovett to W. J. Knight, dated July 28th, 1882, with leave to file certified copy thereof.

Filed in evidence and marked Exhibit "A."

Counsel for plaintiff offered in evidence deed from W. J. Knight to John C. Knight, dated February 7th, 1887, to an interest in this land.

Filed in evidence and marked Exhibit "B."

Counsel for plaintiff offered in evidence deed from W. J. Knight to Viola P. Knight, dated February 5th, 1887, deeding to Viola P. Knight a portion of this land.

Filed in evidence and marked Exhibit "C."

Counsel for plaintiff offered in evidence deed from Viola P., W. H.

and J. C. Knight, to the full interest in the land to Lutcher & Moore, dated April 13th, 1889.

Filed in evidence and marked Exhibit "D."

34 Counsel for plaintiff offered in evidence certified copy of the petition and judgment of emancipation of Stella Knight.

Objected to by counsel for defendant, for the reason that she does not sue as an emancipated minor. There is nothing in her petition showing that she is an emancipated minor, and on the further ground, it is something that has occurred after the institution of this suit.

Objection overruled by the Court.

To which ruling of the Court counsel for defendant excepts and reserves bill of exceptions.

Filed in evidence and marked Exhibit "E."

Counsel for plaintiff offered in evidence the petition, answer and judgment in the suit of McIlhaney and Company *vs.* Knight & Lovett, W. J. Knight, Intervener.

Objected to by counsel for defendant, for the reason that they were no- parties to that suit, and on the further ground that the property involved in that suit is not involved in this suit, and it is therefore irrelevant in this case.

Objection overruled by the Court.

To which ruling of the Court counsel for defendant excepts, and reserves bill of exceptions.

Filed in evidence and marked Exhibit "F."

Counsel for plaintiff offered in evidence petition and answer and record, including judgment in the case of Albert S. Jamisson *vs.* Knight & Lovett, W. J. Knight, Intervener.

Objected to by counsel for defendant for the same reasons given to the former offering.

Objection overruled by the Court.

To which ruling of the Court counsel for defendant excepts and reserves bill of exceptions.

Filed in evidence and marked Exhibit "G."

Plaintiffs rest.

35 *Defendant's Evidence.*

It is admitted that the interest of G. B. Del Moore in this property involved in this case was transferred to the Lutcher & Moore Lumber Company; that is, leaving the ownership in Lutcher and the Lutcher & Moore Lumber Company.

Counsel for defendant offered in evidence the testimony of Dr. J. A. Lovett, taken under commission before J. F. Dabney, Liberty County, Texas.

Objected to by counsel for plaintiff, for the reason that parole testimony cannot be introduced to change, vary or to prove title to real estate.

We object for the further reason that whatever title the defendants claim in this case is derived from W. J. Knight, and he is estopped from attacking the title of W. J. Knight.

We object for the further reason that they are not shown to be creditors of Knight & Lovett, and therefore have no interest in contesting the deed from Knight & Lovett to W. J. Knight.

We further object for the reason and on the ground of the plea of *res adjudicata*, which we have already filed in this case, and on the further ground that there are no allegations in the defendant's answer of fraud or error in any manner, shape or form.

Objection sustained by the Court.

To which ruling of the Court counsel for defendant excepts and reserves bill of exceptions.

Court thereupon adjourned until to-morrow morning at ten o'clock.

November 1st, 1906, Court met pursuant to adjournment and trial of above cause was resumed.

Without abandoning the exception made to the ruling of the Court, counsel for defendant offers the testimony of Dr. J. A. Lovett, for the purpose of showing only that the purchase price of this land was the fourteen thousand five hundred dollars note was paid by W. J. Knight, after the death of his wife, by the sale of this identical land.

Offers so much of the testimony as tends in this depositions to affect that subject matter.

Objected to by counsel for plaintiff for the reason that under the allegations of the defendants answer, they have not set up
36 any settlement of the community between W. J. Knight and Mary Cain Knight, and they should not be allowed to introduce this testimony until a fair settlement of the comm*i*nit*u* [community] existing between them has been adjusted, and these parties have no right to call for that adjustment in this collateral manner.

Objected to for the further reason that if the note has been paid, the receipted note is the best evidence of its payment.

Counsel for defendants offers amended answer.

Objected to by counsel for plaintiff, for the reason that *is* it is in the nature of want of tender and it comes too late. And for -he further reason it is inconsistent with the original pleadings and changes the issues, and is not allowable after the case has been opened and trial begun.

Objection sustained by the Court.

To which ruling of the Court counsel for defendant excepts and reserves bill of exceptions.

Counsel for defendant offers the testimony of Dr. J. A. Lovett, for the purpose of showing that the sale of this property from W. J. Knight to Viola P. Knight and J. C. Knight, and later to Lutcher & Moore, was made for the purpose of paying the fourteen thousand five hundred dollar note mentioned in the sale of July 28th, 1882, and that the whole proceeds of the sale of the property paid in that sale went to pay that note.

Objected to by counsel for plaintiff, for the reasons already given.

Objection sustained by the Court.

To which ruling of the Court counsel for defendant excepts and reserves bill of exceptions.

Now counsel for defendants offer in this connection T. J. Word, a witness, who will likewise testify that the proceeds of the sale of this property went to pay this fourteen thousand five hundred dollar note.

Same objection by counsel for plaintiff.

Objection sustained by the Court.

To which ruling of the Court counsel for defendant excepts and reserves bill of exceptions.

Counsel for defendant also offers the witness James Cavanaugh for the same purpose.

Same objection by counsel for plaintiff.

Objection sustained by the Court.

37 To which ruling of the Court counsel for defendant excepts and reserves bill of exceptions.

T. G. B. Cox, witness for defendant, being first duly sworn, testified as follows:

On direct examination he said:

Q. Mr. Cox, you are the land man for the Lutcher Moore Lumber Company?

A. Yes, sir.

Q. How long have you been connected with them?

A. Since 1901; January, 1901.

Q. Are you acquainted with the land that is involved in this suit?

A. Yes, sir.

Q. Do you know its market value?

A. Yes, sir; I think so.

Q. Will you state whether or not the market value of that land is in excess of five thousand dollars?

A. Yes, sir; it is.

Q. Is it valued at more than five thousand dollars or less?

A. It is worth more than that.

Q. How much taxes have the Lutcher & Moore paid on this land since they got it in 1889?

A. I am not able to say; could not say how much.

Q. Who has paid taxes on it?

A. Lutcher & Moore.

Q. Have you the tax receipts?

A. I have them at the hotel.

Objected to, as the receipts are the best evidence.

Counsel for defendant offers receipts, with leave to submit them as soon as the witness can go and get them.

To be filed in evidence and marked exhibit —.

Q. You have the tax receipts?

A. Yes, sir; up to 1901, and I have them since 1901, but since then I did not bring them along with me, but we have them *along with me, but we have them* on file in our office.

Q. Do you know how much the taxes have been per annum on this particular land?

BLURRED PA

A. No, sir; I do not know exactly how much it has been;
38 all the land has been assessed together, the whole bulk of their land in Vernon Parish are assessed at so many acres at a certain amount. I do not know what the rate of taxation is. Could not say what was the amount of taxes on this particular piece.

Evidence closed.

I hereby certify that the above and foregoing is a true and correct translation of my stenographic notes taken on the trial of the above numbered and entitled cause.

R. B. COOK,
Stenographer.

Fees of stenographer for taking evidence and making two carbon copies of same..... $11.70

[On margin in red ink:] Attached to defendant's Bill of Exceptions No. 3.

THE STATE OF LOUISIANA,
Parish of Vernon:

Know all men by these presents:

That this deed for the conveyance, sale and transfer of property, entered into on this 28th day of July, 1882, between Daniel Knight and John A. Lovett, on the one part, and William J. Knight, of the other part, all of Vernon Parish, Louisiana, witnesseth:

That for and in consideration of the sum and price as hereinafter expressed, the said Daniel Knight and John A. Lovett, who are trading and doing business under the name, firm and style of Knight & Lovett, have, and do hereby sell, transfer, alienate and deliver over to said William J. Knight, his heirs and assigns, forever, free from all debts, troubles, mortgages or other encumbrances whatsoever, the following described property, to-wit: Lands, The S. W. ¼ of S. E. ¼ and S. E. ¼ of S. W. ¼, Sec. 5, T. 2 S., Range 11 W.; the N. ½ of N. E. ¼ of Sec. 32 and S. E. ¼ and S. ½ of N. E. ¼, Sec. 33, T. 1 S., R. 11 W., and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼ and N. W. ¼ and N. ½ of N. E. ¼, Sec. 5, T. 2 S., R. 11 West, and N. E. ¼ of N. E. ¼, Sec. 20, and N. W. ¼ of N. W. ¼, Sec. 21, T. 2 S., R. 11 W.,
39 and N. ½ of N. E. ¼ and N. E. ¼ of N. W. ¼, Sec. 21, and N. W. ¼ of N. W. ¼, Sec. 22, T. 2 S., R. 11 West, and N. E. ¼ of N. E. ¼, Sec. 20, and N. W. ¼ of N. W. ¼, Sec. 21, T. 2 S., R. 11 W., and Fractional N. W. ¼ of Fraction N. E. ¼ of Sec. 6, T. 2 S., R. 11 W., and S. ½ of N. E. ¼, Sec. 6, T. 2 S., R. 11 W., and N. W. ¼ of N. E. ¼, Sec. 34, T. 2 S., R. 11 W., and E. ½ of N. W. ¼, Sec. 20, T. 2 S., R. 11 W., and S. ½ of N. E. ¼ and S. E. ¼ of N. W. ¼ of Sec. 23, and S. W. ¼ of N. W. ¼ of Sec. 24, T. 2 S., R. 11 W., and N. E. ¼ of N. E. ¼, Sec. 6, T. 2 S., R. 11 W., and W. ½ of S. W. ¼ of Sec. 17, N. E. ¼ of S. E. ¼, Sec. 18, T. 2 S., R. 11 W., and W. ½ and N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼, Sec. 23, T. 2 S., R. 11 W., and 320 acres in

Secs. 33, 28 and 29, T. 1 S., R. 11 W., being the same acquired by us from Solomon Caps and Daniel Hale, and the same on which the mill, gin, &c., is situated, in all herein conveyed two thousand one hundred and sixty-two acres, more or less, all in Vernon Parish, La. Also our store-house and stock of goods, and our accounts, books, &c., and all logs in the Sabine River, or any of its tributaries, or on land, both cypress and pine, in our brand. And all the contents of our store house, iron safe, &c. And mules and one wagon and two horses; and all other logs owned by us in any other brand.

The consideration which said William J. Knight pays for said property is the sum and price of fifteen thousand dollars, of which amount five hundred dollars in cash and in hand paid, the receipt whereof is hereby acknowledged, and the balance of fourteen thousand and five hundred dollars to be due and payable on 1st November, 1882, for which amount the said W. J. Knight has this day executed his note in favor of said vendors, or bearer, drawing eight per cent. per annum interest from maturity till paid.

In testimony of all of which this act is signed in the presence of the two undersigned good and lawful witnesses, who, as witnesses with said parties, sign these presents, on this day and year first herein written.

J. A. LOVETT.
D. R. KNIGHT.
W. J. KNIGHT.

Witnesses:
J. H. MARTIN.
W. H. CRAFT.

40 OFFICE CLERK DIST. COURT, &., &c.

THE STATE OF LOUISIANA,
Parish of Vernon:

Personally came and appeared before me, the undersigned authority, W. H. Craft and J. G. Martin, witnesses to the foregoing sale and transfer of property, entered into on the 28th day of July, 1882, who, being by me duly sworn, declared and said that the above and foregoing deed was duly signed in their presence by the said J. A. Lovet and Daniel E. Knight of one part, and William J. Knight of the other part, on day and date therein written, and for uses and purposes therein expressed.

W. H. CRAFT.
J. H. MARTIN.

Sworn to and subscribed before me, this 29th day of July, 1882.

[SEAL.] WM. H. SMART,
Clerk. Dist. Court, &c., &c.

Filed for record July 29th, 1882, and recorded Aug. 7th, 1882, in book D, folios 17 and 18 of said book.

[SEAL.] W. H. SMART,
Clk. Court, &c., &c.

STATE OF LOUISIANA,
Parish of Vernon:

I, W. A. Moore, Dy. Clerk of 12th District Court and *Ex-Officio* Recorder in and for Vernon Parish, Louisiana, do hereby certify that the above and foregoing is a true and correct copy of the original filed and recorded in this office, recorded in conveyance book "D," pages 17 and 18.

Witness my official signature and seal of office, this the 23rd day of February, A. D. 1904.

[SEAL.]

W. A. MOORE,
Dy. Clerk and ex-Officio Recorder.

Indorsed: No. 276. Wm. J. Knight, *et al., vs.* Lutcher & Moore Lumber Co. Filed in evidence by Pltff. Feb'y 24/04. W. Jackson, Clerk.

Indorsed: Filed in evidence "A" Oct. 31st, 1906, in suit No. 276. W. Jackson, Clerk.

41 STATE OF LOUISIANA,
Parish of Natchitoches:

Before me, Isaac F. Carter, a notary public in and for the Parish and State aforesaid, duly commissioned and qualified, personally came and appeared William J. Knight, a resident of Vernon Parish, Louisiana, who *declare* [declares], in the presence of me, said notary, and the undersigned subscribing witness, to be hereinafter named, that for the consideration, price and sum of six hundred (600) dollars, cash in hand paid, the receipt of which is hereby acknowledged, he has this day, and does by these presents grant, bargain, sell, transfer, assign, set over, convey and deliver, with full and lawful warranty, unto John C. Knight, also of said residence here present, purchasing and accepting for himself, his heirs and assigns, one fourth interest undivided, the following described property, including the buildings, fixtures and improvements thereon, to-wit:

The S. W. ¼ of S. E. ¼ and the S. E. ¼ of S. W. ¼ of Sec. 5, and the N. ½ of N. E. ¼ of Sec. 32, and the S. E. ¼ and S. ½ of N. E. ¼ of Sec. 33, in T. 1 South, R. 11 West, and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ and the N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼ and the N. ½ of N. E. ¼ in Sec. 5, T. 2 S., R. 11 W., and the N. E. ¼ of N. E. ¼ of Sec. 20, and N. W. ¼ of N. W. ¼ and N. ½ of N. E. ¼ and N. E. ¼ of N. W. ¼ and N. W. ¼ of N. W. ¼ of Sec. 21, and N. W. ¼ of N. W. ¼ of Sec. 22, and N. E. ¼ of N. E. ¼ of Sec. 20, and Fractional N. W. ¼ of Fractional N. E. ¼ of Sec. 6, and the S. ½ of N. E. ¼ of Sec. 6, and N. W. ¼ of N. E. ¼ of Sec. 34, and E. ½ of N. W. ¼, Sec. 20, and S. ½ of N. E. ¼ and S. E. ¼ of N. W. ¼ of Sec. 23, and S. W. ¼ of N. W. ¼ of Sec. 24, and the N. E. ¼ of N. E. ¼ of Sec. 6, and W. ½ of S. W. ¼ of Sec. 17, and N. E. ¼ of N. E. ¼ of Sec. 18, and W. ½ of and N. E. ¼ of S. W. ¼, and N. W. ¼ of N. E. ¼ of Sec. 23, all in Township 2 S., Range 11 W., and 320 acres of land in Secs. 33, 28 and 29, in T. 1 S., R. 11 W., in all an undivided one-fourth

interest, of which is therein conveyed two thousand, one hundred and sixty-two acres, and a like one-fourth interest in the S. W. ¼ of Sec. 33, T. 1 S. R. 11 W. containing 160 acres of land, all lying and being situated in the parish of Vernon, State of Louisiana.

To have and to hold, said undivided one-fourth interest in
42 and to said tract of land and improvements thereon with the said purchaser his heirs and assigns forever. The vendor hereby binding himself, his heirs and assigns forever to warrant & defend the parcel of land herein conveyed against the legal claims & demands of all persons whatsoever.

The certificate of mortgages required by law is dispensed with *if* [by] consent and waived by the purchaser.

The words "one-fourth interest undivided" on line 22 of page interlined, read and considered before signing.

Thus done, passed and signed at my office in Robeline, in the presence of D. R. Knight, Jr. and T. S. Knight, good lawful & competent witnesses who subscribe their names hereto with the parties, and me, said notary, on this the 7th day of February, A. D. 1887.

W. J. KNIGHT.
JOHN C. KNIGHT.

Attest:
D. R. KNIGHT,
T. S. KNIGHT.

ISAAC F. CARTER,
[SEAL.] *Not. Pub.*

Filed for record and recorded April 7, A. D. 1887, in book of conveyances marked D, pages 285 and 286.

W. A. WINFREE,
[SEAL.] *Deputy Clerk Court, &c., &c.*

Indorsed: No. 276. W. J. Knight, Deed, John C. Knight. Filed in evidence by Def't Feb'y 25/04. W. Jackson, Clerk.

2nd Indorsement. Filed in evidence "B" Oct. 31st, 1906, in suit No. 276. W. Jackson, Clerk.

THE STATE OF LOUISIANA,
Parish of Natchitoches:

Before me, Isaac F. Carter, a notary public in and for the Parish and State aforesaid, duly commissioned and qualified, personally came and appeared William J. Knight, a resident of Vernon Parish, Louisiana, to me well known, who declared in the presence of me, said notary, and the undersigned subscribing witness to be hereinafter named, that for the consideration, price and sum of
43 twelve hundred dollars, cash in hand paid, the receipt of which is hereby acknowledged, he has this day and does by these presents grant, bargain, sell, transfer, assign, set over, convey and deliver, with full and lawful warranty, unto Mrs. Viola P. Knight, wife of Daniel R. Knight, resident of the Parish of Natchitoches, and duly separate in property from her said husband, here present, purchasing and accepting for herself, her heirs and assigns, with the aid, authorization and assistance of her said husband, who appears for that purpose, an undivided one-half interest in the fol-

lowing described property, including the buildings, fixtures and improvements thereon, to-wit:

The South West quarter of the South East quarter and the South East quarter of South West quarter of Section Five, Township No. 2 S., Range Eleven West. The North half of the North East quarter of Section Thirty-two, and the South East quarter and South half of North East quarter of Section Thirty-three, Township One South, Range Eleven West, and the South West quarter of North East quarter, and South East quarter of North West quarter, and the North East quarter of South West quarter, and the North West quarter of South East quarter, and the North half of North East quarter, Section Five, Township Two, South of Range Eleven West, and the North East quarter of North East quarter, Section Twenty, and N. W. ¼ of N. W. ¼, Sec. 21, T. 2 S., R. 11 W., and N. ½ of N. E. ¼ and N. E. ¼ of N. W. ¼, Sec. 21, and N. W. ¼ of N. W. ¼, Sec. 22, T. 2 S., R. 11 W., and N. E. ¼ of N. E. ¼ Sec. 20, and N. W. ¼ of N. W. ¼ Sec. 21, T. 2 S., R. 11 W., and fractional North West ¼ of fractional N. E. ¼ of Sec. 6, T. 2 S., R. 11 West, and the S. ½ of N. E. ¼, Sec. 6, S. [T.] 2 S., R. 11 W., and N. W. ¼ of N. E. ¼ Sec 34, and E. ½ of N. W. ¼ Sec. 20, and S. ½ of N. E. ¼ and S. E. ¼ of N. W. ¼ of Sec. 23, and South West quarter of N. W. ¼ of Sec. 24, and N. E. ¼ of N. E. ¼ of Sec. 6 and W. ½ of S. W. ¼ of Sec. 17 and N. E. ¼ of S. E. ¼ of Sec. 18, and W. ½ and N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼ of Sec 23, all in T. 2 S., Range 11 West; and 320 acres of land in Sec. 33, 28 and 29, in T. 1 S., R. 11 West, in all, herein conveyed, two thousand one hundred and sixty-two acres; and the South West quarter of Sec. 33, T. One S., Range 11 West, containing one hundred and sixty-three acres of land, all lying and being situated in the Parish of Vernon, Louisiana.

To have and to hold said undivided half interest in said
44 tracts of land and improvements thereon unto the said purchaser, her heirs and assigns, for their own proper purposes and use forever.

The vendor hereby binding himself, his heirs and assigns forever, to warrant and defend said tracts of land against the legal claims and demands of all persons whatsoever.

The mortgage certificate required by law is waived by the purchaser.

Thus done, *person* [passed] and signed at my office in the town of Robeline, in the presence of D. R. Knight and W. H. Craft, good lawful and competent witnesses, who subscribe their names hereto with the parties and me notary, on this the 5th day of February, A. D. 1887.

W. J. KNIGHT,
VIOLA P. KNIGHT.

Attest:
W. H. CRAFT.
D. R. KNIGHT, Jr.

Authorized by me:
D. R. KNIGHT.

ISAAC F. CARTER,
Not. Pub.

Filed for record and recorded April 7, A. D. 1887, in book of conveyances marked D, pages 282 and 283.

W. A. WINFREE,
[SEAL.] *Deputy Clerk Court.*

Indorsed: Filed in evidence by Def't, Feb'y 25/04. W. Jackson, Clerk.

2nd Indorsement: Filed in evidence "C," Oct. 31/06, in suit No. 276. W. Jackson, Clerk.

STATE OF TEXAS,
County of Orange:

Know all men by these presents:

That we, Viola P. Knight, of Robeline, Natchitoches Parish, Louisiana, W. J. Knight and J. C. Knight, of Almadine, Vernon Parish, Louisiana, for the consideration hereinafter set forth, have bargained, sold and delivered, and do hereby bargain, convey
45 sell and deliver to the firm of Lutcher and Moore, composed of Henry J. Lutcher and G. Bedell Moore, of the town of Orange, of the State of Texas, their heirs and assigns forever, the following tracts *of* [or] parcels of land, situated in Vernon Parish, in the State of Louisiana, more particularly described as follows, that is to say:

The S. E. quarter of Sec. 33, in Township 1 S., Range 11 W., and the S. W. quarter of the N. E. quarter, and the S. E. quarter of the N. W. quarter, and the N. E. quarter of the S. W. quarter, and the N. W. quarter of the S. E. quarter of Sec. 5, Township 2 S., Range 11 W.

And the N. E. quarter of the N. E. quarter of Sec. 20, and the N. W. quarter of the N. W. quarter of Sec. 21, Township 2 S., Range 11 W.

And the W. half and the N. E. quarter of the S. W. quarter and the N. W. quarter of the S. E. quarter, Sec. 23, Township 2 S., Range 11 W.

And the E. half of the N. W. quarter, Sec. 20, Township 2 S., Range 11 W. And the N. W. quarter of the N. E. quarter, Sec. 34, Township 2 S., Range 11 W. And the W. half of the S. W. quarter of Sec. 17, and the N. E. quarter of the S. E. quarter Sec. 18, Township 2 S., Range 11 W.

And the S. half of the N. E. quarter and the S. E. quarter of the N. W. quarter of Sec. 23, and the S. W. quarter of the N. W. quarter of Sec. 24, Township 2 S., Range 11 W. And the N. half of the N. E. quarter and the N. E. quarter of the N. W. quarter, Sec. 21, and the N. W. quarter of the N. W. quarter of Sec. 22, Township 2 S., Range 11 W. And the N. E. quarter of the N. E. quarter of Sec. 22, and the N. W. quarter of the N. W. quarter of Sec. 23, Township 2 S., Range 11 W. And the S. half of the N. E. quarter, Sec. 13, Township 2 S., Range 11 W. And the S. W. quarter of the S. E. quarter and the S. E. quarter of S. W. quarter of Sec. 5, Township 2 S., Range 11 W.

And the S. W. quarter of Sec. 33, Township 1 S., Range 11 W.

And the S. half and the N. W. quarter and the W. half of the N. E. quarter of Sec. 16, Township 2 S., Range 11 W; aggregating in all two thousand and eighty-three (2083) acres, more or less.

The price or consideration for which said lands are sold is the sum of two thousand and eighty-three (2083) dollars in cash before the execution of these presents, the receipts of which is hereby acknowledged, and full acquittance given therefor.

To have and to hold the above described premises, together
46 with all and singular [the] rights and the appurtenances thereto in any wise belonging to the said Lutcher & Moore, their heirs and assigns forever. And we do hereby bind our heirs and executors and administrators to warrant and forever defend, all and singular, the said premises unto the said Lutcher & Moore, their heirs and assigns, forever, against every person whomsoever lawfully claiming or to claim same or any part thereof.

Witness our hands at Orange, Texas, this thirteenth day of April, A. D. 1889.

VIOLA P. KNIGHT,
Per DANIEL R. KNIGHT.
W. J. KNIGHT.
J. C. KNIGHT.

Signed and delivered in the presence of:

E. W. ZIMMERMANS.
J. M. CROWE.

STATE OF TEXAS,
County of Orange:

Before me, the undersigned authority, personally came Daniel R. Knight, attorney in fact for Viola P. Knight; also appeared W. J. Knight and J. C. Knight, vendors in the above conveyance, to me well known, and acknowledged that they executed the same of their own free will and accord, for the objects and purposes therein expressed, and in my presence subscribe their names thereto.

Witness my hand and seal, this 13th day of April, A. D. 1889.

[SEAL.] H. W. SELLS,
J. P., Pract. ot. and ex Officio N. P., Orange Co., Texas.

Filed for record and recorded April 24th, 1889, in conveyance book D, folios 440 and 441 of said book. Hugh L. Sanders, Clk. Dist. Court, &c.

Indorsed: Filed in evidence by Def't., Feb'y 25th, 1904. W. Jackson, Clerk.

2nd indorsement: Filed in evidence "D," Oct. 31/06, in suit No. 276. W. Jackson, Clerk.

47 *Petition.*

To the Hon. Judge of the 12th Judicial District, sitting in and for the Parish of Vernon and State of Louisiana:

The petition of Stella Knight, a resident of Vernon Parish, Louisiana, respectfully represents that she is a minor, over the age of eighteen years; that her mother died about seventeen years ago, and thereafter her father, W. J. Knight, was confirmed as dative tutor, he having married a second time, of petitioner in the proceedings of the tutorship of the minor heirs of Mary Knight, No. — of the docket of this Court.

That petitioner has her own way to make in the world, and it is desirable for her greater success that she should be fully emancipated, and that petitioner is fully capable of managing her own affairs.

That petitioner owns very little more than the undivided interest in her mother's estate, the value of which is hardly known.

That petitioner annexes hereto the written assent of her father, dative tutor, as required by law.

Wherefore, petitioner prays that this Court, after due examination of petitioner as required by law, render judgment herein decreeing petitioner to be fully emancipated and relieved of all the disabilities which now attach to minors, and with full power to do and perform all acts as fully as if she had arrived at the age of twenty-one years.

STELLA KNIGHT.

Assent of Father and Dative-Tutor.

I hereby fully assent to the complete emancipation of my daughter, Stella Knight, by decree of Court. She is fully capable of managing her own affairs.

Leesville, Vernon Parish, Louisiana, March 5, 1903.

W. J. KNIGHT.

Emancipation of Stella Knight.

No. —. 12th District Court in and for Vernon Parish, Louisiana.

Considering the petition and assent on file and having interrogated the petitioner, the Court being satisfied, the said petitioner is fully capable of administering her own affairs, it is ordered, adjudged and decreed that the petitioner, Stella Knight, be
48 fully emancipated and relieved of all the disabilities which attach to minors, with full power to do and perform all acts as fully as if she had attained the age of twenty-one years.

Judgment rendered and signed at Chambers, in Many, La., on this 9th day of March, 1903.

J. B. LEE,
Judge 12th Jud. Dist. of La.

Filed 11th day of M'ch, 1903.

J. J. HICKS,
Clerk District Court.

STATE OF LOUISIANA,
Parish of Vernon:

I, J. J. Hicks, Clerk of the 12th Judicial District Court in and for the Parish of Vernon, Louisiana, do hereby certify that the above and foregoing is a true and correct copy of the original on file and of record in this office, recorded in suit record No. 1, page 7, *et seq.*

Witness my official signature and seal of office, at Leesville, La., on this the 3rd day of March, A. D. 1904.

J. J. HICKS,
Clerk 12th Dist. Court.

[SEAL.]

Indorsed: Filed in evidence "E," Oct. 31/06, in suit No. 276. W. Jackson, Clerk.

In the 14th Judicial District Court of the State of Louisiana, in and for the Parish of Vernon.

To the Honorable Judge of said Court:

The petition of McIlhenny Company, a commercial firm, residing and doing a commercial business under said firm name and style, in the city of Houston, Harris County, State of Texas, composed of Samuel K. McIlhenny, William R. Baker, William D. Cleveland, William B. Botts, Frederick A. Rice and Benjamin A. Botts, all residents, also, of said city of Houston, Harris County, State of Texas, respectfully represents that Daniel R. Knight and John A. Lovett, residents of said Parish of Vernon, Louisiana, as formerly, if not now, composing the commercial partnership firm of Knight & Lovett, formerly, if not now, domiciled and doing a commercial partnership business under said firm name and style in said Parish
49 of Vernon, Louisiana, are indebted *in solido* to your petitioners in the sum of three hundred and eighty 73/100 dollars, with five per cent. per annum interest thereon from January 26, 1882, until paid, for goods, wares and merchandise purchased by said Knight & Lovett from your petitioners, November 26, 1881, and for cases or boxes therefor, and drayage and insurance thereon, as will be shown by a detailed account thereof to be duly established and to be introduced in evidence on the trial of this suit.

Your petitioners aver amicable and ineffectual demand of payment of said account.

Your petitioners aver that the said Daniel R. Knight and John A. Lovett recently, while composing said firm of Knight & Lovett, and while doing business as aforesaid under said firm name and style of Knight & Lovett, have disposed of a large part of their property in said Parish of Vernon, with intent to defraud their creditors, including your petitioners, and therefore your petitioners are legally entitled to obtain an attachment of the property rights and credits of said defendants, and such attachment is necessary to secure payment of your petitioners' said claim.

Wherefore, your petitioners pray that the said Daniel R. Knight and John A. Lovett may be cited to appear and answer hereto, for an order and writ of attachment and for an attachment thereunder

of the property, rights and credits of said Daniel R. Knight and John A. Lovett, as formerly, if not now, composing said firm of Knight & Lovett, to an amount sufficient to pay and satisfy your petitioners' said claim, with interest as aforesaid and all costs of this suit; that your petitioners may have judgment for and recover from said Daniel R. Knight and John A. Lovett, *in solido*, said sum of three hundred and eighty 73/100 dollars, with interest thereon as aforesaid, and all costs of this suit; that your petitioners' legal privilege on the property, rights and credits of said defendants which may be attached in this suit, and resulting from such attachment, may be recognized and may be enforced by a seizure and sale thereof to pay and satisfy said judgment; for all further orders and decrees necessary in the premises, and for general relief.

By their attorney at law: GEO. H. WELLS.

Before me, the undersigned Clerk of the 14th Judicial District Court of the State of Louisiana in and for Parish of Vernon,
50 personally appeared George H. Wells, Esquire, attorney at law, to me personally known, who, being duly sworn, deposes and says he is the attorney of McIlhenny Company, the petitioners in the above and foregoing petition; that all the facts and allegations contained in said petition are true to best of affiant's knowledge and belief, and that the attachment therein prayed for is necessary, for the reasons and purpose therein alleged.

GEO. H. WELLS,
Attorney for the Petitioners, McIlhenny Company.

Sworn to and subscribed before me at Leesville, Vernon Parish, Louisiana, August 16, 1882.

WM. H. SMART,
Clk. 14th Jud. Dist., Vernon Parish, La.

Let a writ of attachment issue and be executed as prayed for on the petitioners furnishing bond with surety as required by law.

Given officially at my office, at the court house at Leesville, Vernon Parish, Louisiana, August 16th, 1882.

Witness my official signature and seal.

WM. H. SMART,
Clk. Court.

In District Court, Vernon Parish, Louisiana.

No. 60.

McIlhenny Co.
vs.
D. R. Knight et al., W. J. Knight, *invor* [Intervener].

And now comes defendants and answering, without prejudice to their motion to dissolve attachment, acknowledge indebtedness as claimed by plaintiffs, and deny all other allegations of plaintiffs.

J. F. SMITH,
A. J. KEARNEY,
Attys.

Attest: A true copy of the original.

[SEAL] J. J. HICKS, *Clerk.*

51 In Dist. Court, Vernon Parish, Louisiana.

No. 60.

McILHENNY COMPANY
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

And now comes defendants, and before answering, moves this Honorable Court to dissolve and set aside the attachment in this cause, for the following reasons, to-wit:

1st. That the affidavit on which the attachment was issued is defective, illegal and insufficient, and not stating the debt sued on to be due.

2nd. That the affidavit and bond on which the attachment was issued is defective, illegal, void and insufficient, the said affidavit having been made and the said attachment bond executed by Geo. H. Wells, for plaintiffs, who was without special authority as the law requires to so make said affidavit and execute said bond for plaintiffs.

3rd. The affidavit on which said attachment was issued is defective, illegal and insufficient in not stating that plaintiffs were absent at the time from Vernon Parish, and in not stating that the amount claimed was positively due by defendants, and in not stating that the same was made on the affiants' own knowledge, and not from information derived from plaintiffs.

4th. That there was no legal order for the issuing of said attachment, and that what purports to be an order was made prematurely and long before the giving of any attachment bond.

5th. That the affidavit on which the attachment issued is insufficient, being made long previous to action on the petition, and long previous to the giving attachment bond, and long previous to issuing the writ of attachment, and plaintiffs, or one of them, could or might have been in Vernon Parish at the time of giving bond, and at the time of issuing writ of attachment, the facts as to which should have been made to appear by new affidavit.

Wherefore defendants pray that said attachment be dissolved and set aside at plaintiffs' coest, and for full and general re-
52 lief, &c.

J. F. SMITH &
A. J. KEARNEY,
Att'ys.

Filed 8th day of November, 1882.

W. H. SMART,
Clk. Dis. Court.

To the Hon. S. D. Read, Dist. Judge of 14th Judicial District of Louisiana, holding sessions of Court in and for Vernon Parish, in the District and State aforesaid:

The petition of intervention of William J. Knight, a resident of Vernon Parish, La., with respect represent to your Honor that in

suit No. 60 on docket and now pending before your Hon. Court in and for the Parish of Vernon, entitled, McIlhenny Company *vs.* Daniel R. Knight and John A. Lovett, a writ of attachment against the property of said defendants was issued, and that said plaintiff and C. F. Conerly, Sheriff of said Parish of Vernon, has, under and by virtue of said writ of attachment so issued in said cause, attached and taken into their possession ten (10) yoke oxen, three (3) log carts, one (1) log wagon, six (6) log chains and one (1) set of blacksmith tools, as seen by the return on the back of said writ of attachment, which return is referred to and made part hereof, valued at the sum of seven hundred and forty-eight dollars, and that he is the legal, just and *bona fide* owner of said property so attached under and by virtue of said writ, and now intervenes in said suit No. 60, claiming said property so attached to belong to him, as seen by act of sale and purchase from said defendants, duly recorded in Vernon Parish, Louisiana, and all of which will be duly shown on trial hereof.

Wherefore (*whereof*), the premises considered, petitioner prays for an order of your Hon. Court, permitting and allowing him to intervene in said suit and to bond said property, and for citation to McIlhenny Company, plaintiff, a resident of Houston, Harris County and State of Texas, and citation to defendants, Daniel R. Knight and John A. Lovett, residents of Vernon Parish, Louisiana, and after due trial had, that judgment be rendered by your Hon. Court decreeing him to be the legal, just and *bona fide* owner of said property so attached in said suit, and that the same be released from said
53 attachment and that he be put and maintained in the just and peaceful possession thereof.

Petitioner prays for judgment for costs, all other necessary orders and decrees, and for full and general relief, &c.

J. F. SMITH, *Att'y.*

THE STATE OF LOUISIANA,
Parish of Vernon:

I, William J. Knight, plaintiff in the foregoing petition of intervention, do solemnly swear that the facts and allegations as set forth and contained in the said petition are true and correct, and that the Hon. S. D. Read, Dist. Judge of the 14th Jud. District of Louisiana, is a non-resident of Vernon Parish and now absent from same. So help me God.

W. J. KNIGHT.

Sworn to and subscribed before me, 22nd day of Sept., 1882.

WM. H. SMART,
Cl'k Dist. Court.

BLURRED

In Dist. Court, Parish of Vernon, Louisiana.

No. 60.

McIlhenny Company
vs.
D. R. Knight et al.

Be it ordered that William J. Knight, plaintiff in the foregoing petition of intervention be and he is hereby permitted and allowed to intervene in the above entitled and numbered suit. And further that he be and is hereby allowed and permitted to bond and replevy the property attached in said suit by giving bond and security as required by law.

In the absence of the Hon. Dist. Judge, done and signed by me as clerk of the Dist. Court, in and for the Parish of Vernon, Louisiana, on this 22nd day of Sept., 1882.

WM. H. SMART,
Cl'k Dist. Court.

Filed Sept. 22, 1882.

W. H. SMART,
Cl'k Dist. Court.

54 *Citation.*

In Dist. Court, Vernon Parish, La.

No. 60.

McIlhenny Company
vs.
D. R. Knight et al., W. J. Knight, Intervener.

The State of Louisiana to Daniel R. Knight and John A. Lovett, residents of the Parish of Vernon, La., and defendants in above entitled suit, and to McIlhenny Company, residents of City of Houston, Harris County, Texas:

You are hereby cited to appear at the office of clerk, Dist. Court, held in court-house, town of Leesville, La., and comply with the demand contained in the petition of William J. Knight, intervener in suit No. 60, entitled McIlhenny Company *vs.* D. R. Knight, *et al.*, or file your answer thereto in writing in said office in ten days after service hereof with one additional day for every ten miles between your residence & said office.

Witness the Hon. S. D. Read, Judge of said Court, with my hand & seal as clerk, Dist. Court, on this 22nd Sept., 1882.

W. H. SMART,
Cl'k Dist. Court.

AGES

Received this citation together with a copy thereof and a copy of the accompanying petition, and order of intervention, Oct. 19, 1882, and on the 28th day of same mo. & year, I served the same by handing said copy of citation & copy of petition & order of intervention to Geo. H. Wells, Esq., Att'y at Law, in person in the town of Lake Charles, Calcasieu Parish, La.

JULIEN RICHARD, *D'y Sh'ff.*

Service $2.50.

55 In Dist. Court, Vernon Parish, Louisiana.

No. 60.

McIlhenny Company
vs.
Daniel R. Knight et al., W. J. Knight, Intervener.

The State of Louisiana to Daniel R. Knight and John A. Lovett, residents of the Parish of Vernon, La., composing the commercial partnership firm of Knight and Lovett, and defendants in the above entitled suit No. 60, and to McIlhenny Company, residents of Houston, Harris County, Texas, and plaintiffs in the above entitled suit:

You are hereby cited to appear at the office of the clerk of the Dist. Court, Vernon Parish, La., held at the court-house, town of Leesville, La., and comply with the demands contained in the petition of W. J. Knight, intervener in said suit, or file your answer thereto in writing in said — in ten days after the service hereof *after*, with one additional day for every ten miles distance between your residence and said office.

Witness the Hon. S. D. Reed, Judge of said Court, with my hand and seal officially on this 22nd Sept., 1882.

[SEAL.]

W. H. SMART,
Cl'k Dist. Court.

Received certified copies of within citation, petition, &c., &c., of intervention of W. J. Knight, in suit No. 60, entitled McIlhenny Company, *vs.* D. R. Knight, *et al.*, on the 23rd Oct., 1882, and served copy on Knight & Lovett, at their residence on 24th day, same month & year, and served copy on McIlhenny Company, by posting same on court-house door on the 9th day of Oct., 1882.

Distance travelled, 50 miles.
Sh'ff's cost, $11.00.

C. F. CONERLY, *Sh'ff.*

Attest:
A true copy of the original.
[SEAL.]

J. J. HICKS, *Clerk.*

56 In the District Court of Vernon Parish, Louisiana, 14th Judicial District, November Term, 1882.

No. 60.

McILHENNY COMPANY
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

The plaintiffs in the above numbered and entitled suit for answer to the petition of intervention filed therein by William J. Knight, the intervener in said suit, deny all and singular, the facts and allegations contained in said petition of intervention, except the allegation that they have attached, as the property of the defendants in said suit, the property claimed by said intervener.

Plaintiff- specially aver that said intervener's alleged title to said property is a pretended deed of sale to him from the defendants in said suit, and that said pretended deed and the pretended contract of sale evidenced by said deed, were and are a mere and fraudulent simulation and illegal null and void.

Wherefore, plaintiffs pray that said intervener's demand may be rejected and dismissed by a final and definite judgment, at said intervener's costs.

GEO. H. WELLS,
W. A. CARTER,
Att'ys for Plaintiffs.

Filed Nov. 11, 1882.

W. H. SMART,
Cl'k Court.

Attest:
A true copy of the original.
[SEAL.]

J. J. HICKS, *Clerk.*

In the 14th Judicial District Court of the State of Louisiana in and for the Parish of Vernon, November Term, 1883.

No. 60.

McILHENNY COMPANY
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

By reason of the law and the evidence in the above numbered and entitled suit being in favor of the plaintiff- and against
57 the defendants therein, as to plaintiffs' moneyed demand in said suit, a trial having been held upon the merits after issue joined by answer, and the defendants in their answer, having admitted plaintiffs' moneyed demand, and the Court considering the 4th ground of defendants' motion to dissolve the attachment in said suit well taken, to-wit, the ground that the order of attachment is

insufficient in terms, it is ordered, adjudged and decreed that the defendants' motion to dissolve said attachment be and the same is hereby sustained upon the 4th ground of said motion to dissolve the same, to-wit, upon the ground that the order of attachment is insufficient in terms, and that said attachment for that reason, be and the same is hereby dissolved, and that the attached property be released from said attachment, and that the costs of said attachment be paid by McIlhenny Company, plaintiff.

It is further ordered, adjudged and decreed that the plaintiff, McIlhenny Company, do have judgment for and recover from the defendants, Daniel R. Knight and John A. Lovett, *in solido*, the sum of three hundred and eighty 73/100 dollars ($380 73/100), with five per cent. per annum interest thereon from January 26, 1882, until paid, and all costs of said suit, except the costs of said attachment, and the costs of the intervention therein.

And by further reason of the law and the evidence in said suit being in favor of the intervener and against the plaintiff- therein as to the intervention *inside* suit, it is further ordered, adjudged and decreed that said intervener, William J. Knight, do have judgment against said plaintiff McIlhenny Company, recognizing and decreeing said intervener to be the rightful owner of the proprety attached in said suit, under and by virtue of said intervener's purchase thereof from said defendants, by the act of sale executed July 28, 1882, in evidence in said suit, which act of sale is hereby decreed to be a real sale and not a simulation, and that said intervener do have judgment for and recover from said plaintiff, McIlhenny Company, all costs of the intervention in said suit, including the sum of ten dollars to be taxed with the costs of said intervention for the fee allowed by law to W. A. Carter, Esq., plaintiffs' curator, *ad hoc*, in said suit in the matter of said intervention.

Done, read and signed in open Court, November 8, 1883.

STEPHEN D. READ,
Judge, 14th Judicial District of the State of Louisiana.

Filed Nov. 8, 1883.

58 Attest:

A true copy of the original.

[SEAL] J. J. HICKS, *Clerk.*

Indorsed: McIlhenny Co., *vs.* Dan R. Knight, *et al.*, W. J. Knight, Intervener. Filed Feb'y 16th, 1904. W. Jackson, Clerk.

2nd Indorsement: Filed in evidence "F," Oct. 31/06, in suit No. 276. W. Jackson, Clerk.

In the 14th Judicial District Court of the State of Louisiana in and for the Parish of Ver*mont* (Vernon).

To the Honorable Judge of said Court:

The petition of Elbert S. Jemison, of the City, County and State of New York, respectfully represents:

That Daniel R. Knight and John A. Lovett, residents of said Parish of Vernon, State of Louisiana, as formerly if not now composing

the commercial partnership firm of Knight & Lovett, formerly if not now domiciled and doing a commercial business in said Parish of Vernon, under said firm name and style of Knight & Lovett, are indebted, *in solido*, to your petitioner in the sum of eleven hundred and seventy-one 89/100 dollars ($1171 89/100), with eight per cent. per annum interest thereon from February 1, 1882, until paid, as will more fully appear by reference to a promissory note to be produced in evidence on the trial of this suit, made, executed and signed by said Knight & Lovett, and of which the following is in substance a copy:

Dolls. 1171 89/100.

ALMADANE, VERNON PARISH,
LOUISIANA, *February* 1, 1882.

Sixty days after date, we promise to pay to the order of C. M. Peane & Co., eleven hundred & seventy-one 89/100 dollars, at their office in Galveston, Texas, value received, with interest at 10 % per annum from date until paid.

(Signed) KNIGHT & LOVETT.

(Indorsed:) Pay to the order of E. S. Jemison. (Signed) C. M. Peane, & Co.

59 Your petitioner avers that he is the indorsed and legal owner and holder of said promissory note, and that amicable and ineffectual demand of payment thereof has been made.

Your petitioner avers that since the maturity of said note the said Daniel R. Knight and John A. Lovett, while composing said firm of Knight & Lovett, and while doing business as aforesaid under said firm name and style of Knight & Lovett, have disposed of a large part of their property, rights and credits in said Parish of Vernon with intent to defraud their creditors including your petitioner, and, therefore your petitioner is legally entitled to an attachment of the property, rights and credits of said defendants, and such attachment is necessary to secure payment of your petitioner's said claim.

Wherefore, your petitioner prays that the said Daniel R. Knight and John A. Lovett may be cited to appear and answer hereto, for an order and writ of attachment, and for an attachment thereunder of the property, rights and credits of said defendants as formerly if not now composing said firm of Knight & Lovett to an amount sufficient to pay and satisfy your petitioner's said claim with eight per cent. per annum interest thereon as aforesaid, and all costs of this suit, that your petitioner may have judgment for and recover from said Daniel R. Knight and John A. Lovett, *in solido*, said sum of eleven hundred and seventy-one 89/100 dollars, with eight per cent. per annum interest thereon from February 1, 1882, until paid, and all costs of this suit; that your petitioner's legal privilege on the property, rights and credits of said deefndants, which may be attached in this suit, and resulting from such attachment, may be recognized, and may be enforced by a seizure and sale of such attached property, rights and credits, to pay and satisfy said judg-

ment for all further orders and decrees necessary in the premises and for general relief.

By his attorney at law,

GEO. H. WELLS.

Affidavit.

14th Judicial District Court, Clerk's Office.

STATE OF LOUISIANA,
Parish of Calcasieu:

Before me, the undersigned clerk of said Court, personally appeared George H. Wells, esquire, to me personally known as
60 an attorney at law, and a resident of Lake Charles, in said Parish of Calcasieu, Louisiana, who being duly sworn, deposes and says he is the attorney for Elbert S. Jemison, the petitioner in the above and foregoing petition; that all the facts and allegations contained in said petition are true to the best of affiant's knowledge and belief, and that the attachment therein prayed for is necessary far the reasons and purposes therein alleged.

GEO. H. WELLS,
Attorney for Elbert S. Jemison, the Petitioner.

Sworn to and subscribed before me at my office in the town of Lake Charles, Calcasieu Parish, Louisiana, August 19th, 1882.

Witness my official signature and seal.

[SEAL.] THAD S. CAYO,
Clerk, Dist. Court, Calcasieu Parish, La.

Order.

Let a writ of attachment issue as prayed for and be executed on the party furnishing bond and surety as required by law.

Given officially at my office at the court-house, August 22nd, 1882.

Witness my official signature & seal.

[SEAL.] W. H. SMART,
Clerk Court.

Bond.

District Court, 14th Judicial District.

No. —.

ELBERT S. JEMISON
vs.
DANIEL R. KNIGHT ET AL.

STATE OF LOUISIANA,
Parish of Vernon:

Know all men by these presents, That, we, Elbert S. Jemison, of the City, County and State of New York, plaintiff in the above

entitled suit, as principal, and John M. Liles and Augustus
61 F. Evans, as sureties, of said Parish of Vernon, Louisiana, as sureties, are held and firmly bound unto William H. Smart, clerk of said 14th Judicial District Court, of said State of Louisiana, in and for said Parish of Vernon, and to his successors in office, in the penal sum of twelve hundred and fifty dollars, for the payment of which, in lawful money of the United States of America, well and truly to be made, we hereby bind ourselves, *in solido*, and our heirs and legal representatives.

The condition of the above obligation is such, that, whereas, the above bounden principal, Elbert S. Jemison, plaintiff in said suit, has sued out and obtained in said suit an order of attachment for the attachment of the property, rights and credits of the defendants in said suit, to an amount sufficient to pay and satisfy the claim of said plaintiff in said suit for the sum of eleven hundred and seventy-one 89/100 dollars, with eight per cent. per annum interest thereon from February 1, 1882, until paid, and all costs of said suit.

Now, therefore, if the said Elbert S. Jemison, as principal, or the said John M. Liles and Augustus F. Evans, as his sureties, shall pay and satisfy whatever damages may be recovered against them or against either of them by the defendants in said suit, or by any other person who may be interested in the property, rights or credits, which may be attached in said suit, in case it should be decided that said attachment was wrongfully obtained, then the above obligation is to be null and void; otherwise to be and remain in full force and virtue.

Done, read and signed at Leesville, Vernon Parish, Louisiana, August 21st, 1882.

ELBERT S. JEMISON,
Per GEO. H. WELLS,
His Att'y at Law.
J. M. LILES.
AUGUSTUS F. EVANS.

Before me and approved.

W. H. SMART,
Cl'k Court.

Filed Aug. 22nd, 1882.

W. H. SMART,
Cl'k Court.

62 *Citation.*

State of Louisiana, Parish of Vernon, District Court, Clerk's Office.

No. —.

ELBERT S. JEMISON
vs.
D. R. KNIGHT ET AL.

The State of Louisiana to the Sheriff of Vernon Parish, or any of his lawful deputies, Greeting:

By virtue of an order of attachment rendered in the above numbered and entitled suit, you are hereby commanded in the name of

the State of Louisiana, and of said District Court, to attach and seize and take into your possession and to safely keep in your custody until the further order of said Court, the property, rights and credits in said Parish, of Daniel Knight and John A. Lovett, the defendants in said suit as formerly, if not now composing the commercial partnership firm of Knight and Lovett, to an amount sufficient to pay and satisfy the demands of Elbert S. Jemison, the plaintiff in said suit for the sum of ($1171 87/100) eleven hundred and seventy-one & 87/100 dollars, with 8% per annum interest thereon from Feb. 1, 1882, and all costs of said suit. And, how you shall have executed this writ of attachment, you will make due returns to our said Court, and have you then and there this writ.

In Dist. Court, Vernon Parish, Louisiana.

No. 58.

ELBERT S. JEMISON
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

And, now comes defendants and before answering, move this Hon. Court to dissolve and set aside the attachment issued in this cause for the following reasons, to-wit:

1st. That the affidavit and bond upon which said attachment was issued is defective, illegal, void and insufficient, the said affidavit having been made and said executed by Geo. H. Wells, for
63 plaintiff, who was without special authority as the law requires to so make said affidavit and execute said bond for plaintiff.

2nd. That the affidavit on which said attachment was issued is defective, illegal and insufficient in not stating that plaintiff was absent from the parish of Vernon at the time, in not stating that defendants positively were indebted in the amount claimed, and that the same was due, and in not stating that the same was made on affiant's own knowledge and not from information derived from the plaintiff, and moreover, that said affiant did not make said affidavit in Vernon Parish, not before the District Judge of this District, and that C. M. Pearre, of the firm of C. M. Pearre & Co. transferred said note sued on to Elbert S. Jemison, without his knowledge or consent, and without consideration, and that C. M. Pearre is now and was at the time of the subscribing said affidavit and the giving of the attachment bond as much interested in and as much the owner of the note sued on as he ever was, and that said C. M. Pearre was present at the making of said affidavit, and present at the giving of said bond, and was present in the Parish of Vernon, when said affidavit and bond was acted on and when the attachment issued.

3rd. That there was no legal order of Court for the issuing of said attachment.

Wherefore, defendants pray that the said attachment be dissolved and set aside at plaintiff's cost, and for general relief, &c.

J. F. SMITH &
A. J. KEARNY, *Att'ys.*

Filed 8th day of November, 1882.

W. H. SMART,
Cl'k Dist. Court.

Attest:
A true copy of the original.
[SEAL.]

J. J. HICKS, *Clerk.*

64 In Dist. Court, Vernon Parish, Louisiana.

No. 58.

E. S. JEMISON
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Inver.

And, now comes defendants and answering without prejudice to their motion to dissolve attachment, acknowledge indebtedness to plaintiff as claimed, and in all other respects deny the allegations and averments of plaintiff.

J. F. SMITH &
A. J. KEARNY, *Att'ys.*

Filed 13th August, 1883.

W. H. SMART, *Cl'k.*

Attest:
A true copy of the original.

J. J. HICKS, *Clerk.*

To the Hon. S. D. Read, Dist. Judge of 14th Judicial District of Louisiana, holding sessions of Court in and for Vernon Parish in the District and State aforesaid:

The petition of intervention of William J. Knight, a resident of Vernon Parish, Louisiana, with respect, represents to your Honor, that in suit No. 58, on docket, and now pending before your Hon. Court, in and for the Parish of Vernon, entitled Elbert S. Jemison, *vs.* Daniel R. Knight and John A. Lovett, a writ of attachment against the property of said defendants was issued, and that said plaintiffs and C. F. Conerly, sheriff of said Parish of Vernon, have under and by virtue of said writ of attachment so issued in said case, attached and taken in their possession a certain lot of goods, wares and merchandise generally as seen by the return on the back of said writ of attachment which writ is referred to and made part hereof, valued at the sum of fifteen hundred & forty-nine 88/100 dollars, and that he is the legal, just and *bona fide* owner of said property so attached under and by virtue of said writ, and now intervenes in said suit No. 58, claiming said property so attached to belong to him as seen by act of sale and purchase from said

defendants duly recorded in Vernon Parish, Louisiana, and all of which will be duly shown on trial hereof.

65 Whereof, the premises considered, petitioner prays for an order of your Hon. Court, permitting and allowing him to intervene in said suit, and to bond said property and for citation to plaintiff, Elbert S. Jemison, a resident of City, County and State of New York, and citation to defendants, Daniel R. Knight and John A. Lovett, residents of Vernon Parish, Louisiana, and after due trial had, that judgment be rendered by your Hon. Court decreeing him to be the legal, just and *bona fide* owner of said property so attached in said suit, and that the same be released from said attachment, and that he be put and maintained in the quiet and peaceable possession thereof.

Petitioner prays for judgment for costs, all other necessary orders and decrees and for full and general relief, &c.

J. F. SMITH, *Att'y.*

Attest:
A true copy of the original.

—— —— *Clerk*

THE STATE OF LOUISIANA,
Parish of Vernon:

I, William J. Knight, plaintiff in the foregoing petition of intervention, do solemnly swear that the facts and allegations as set forth and contained in the said petition, are true and correct, and that the Hon S. D. Read, Dist. Judge of the 14th Jud. District of Louisiana, is a non-resident of Vernon Parish, and now absent from same. So help me God.

W. J. KNIGHT.

Sworn to and subscribed before me, — 31st day of August, 1882.

[SEAL.] WM. H. SMART,
Clk Dist. Court.

Order.

In Dist. Court, Parish of Vernon, Louisiana.

No. 58.

ELBERT S. JEMISON
vs.
D. R. KNIGHT ET AL.

It is ordered that William J. Knight, plaintiff in the foregoing petition of intervention be and he is hereby permitted and
66 allowed to intervene in the above entitled and numbered suit, and further that he be and is hereby allowed and permitted to bond and replevy the property attached in said suit by giving bond and security as required by law.

In the absence of the Hon. Dist. Judge, done and signed by me as clerk of the District Court, in and for the Parish of Vernon, Louisiana, on this 31st day of August, 1882.

[SEAL.] WM. H. SMART,
Cl'k Dist. Court.

Filed 31st day of August, 1882.

WM. H. SMART,
Cl'k Dist. Court.

Citation.

In Dist. Court, Vernon Parish, La.

No. 58.

ELBERT S. JEMISON
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener

The State of Louisiana to Elbert S. Jemison, a resident of the City, County and State of New York, plaintiff in the above entitled suit, and to Daniel R. Knight and John A. Lovett, residents of the Parish of Vernon, La., defendants in the above numbered suit:

You are hereby cited to appear at the clerk's office held at the court-house, in town of Leesville, Vernon Parish, Louisiana, and comply with the demands contained in the petition of W. J. Knight, intervener, a copy of which accompanies this citation or file your answer thereto in writing in ten days after the service hereof with one additional day for every ten miles between your residence & said office.

Witness the Hon. S. D. Read, Judge with my hand & seal as clerk, Dist. Court, on this 31st day of Aug., 1882.

WM. H. SMART,
Cl'k Court.

Received this citation together with a copy thereof, and a copy of the accompanying petition & order of intervention, Oct. 67 9th, 1882, & on the 10th day of same mo. & year, I served copy of citation & Petition & order of intervention on Geo. H. Wells, Esq., Att'y at Law, by handing the same to him in person in the town of Lake Charles, Calcasieu Parish, La.

Service, $2.50. JULIEN RICHARD, *D'y Sh'ff.*

In Dist. Court, Vernon Parish, La.

No. 58.

ELBERT S. JEMISON
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

The State of Louisiana to Elbert S. Jemison, a resident of the City County and State of New York, and plaintiff in the above entitled suit, and to Daniel R. Knight and John A. Lovett, residents of the Parish of Vernon, Louisiana, and defendants in the above numbered suit:

You are hereby cited to appear at the office of the clerk of the Dist. Court, held at the court-house in the court-house, in town of Leesville, Vernon Parish, La., and comply with the demands contained in the petition of W. J. Knight, intervener in said suit No. 58, a copy of which accompanies this citation, or file your answer thereto in writing in ten days after service hereof with one additional day for every ten miles' distance between your residence & said office.

Witness the Hon. S. D. Read, Judge with my hand & seal as clerk, Dist. Court, on this 31st day August, 1882.

W. H. SMART,
Cl'k Dist. Court.

Received certified — of the within and foregoing petition, citation, &c., &c., on the 23rd day of Oct., 1882, and served same on defendants, Daniel R. Knight and John A. Lovett in person at the residence of John A. Lovett, on 24th day of said month & year.

Distance travelled fifty miles.

Shffs. costs, $7.00.

Also served copies on plaintiff, Elbert S. Jemison, by posting same on the courthouse door on the 9th Oct., 1882.

C. F. CONERLY, *Sh'ff.*

Attest:
A true copy of the original:
[SEAL.]

J. J. HICKS, *Clerk.*

68 In Dist Court, Vernon Parish, Louisiana.

No. 58.

ELBERT S. JEMISON
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

To the Hon. S. D. Read, Judge of 14th Jud. District of La.:

The intervener, William J. Knight, in the above entitled suit, now comes and adopting the allegations in his original petition of

BLURRED

intervention, asks leave to amend the same in this, that plaintiff's in this cause is a non-resident of Louisiana.

Wherefore, he prays that a curator, *ad hoc,* be appointed to represent plaintiff in this cause, and upon whom service of copies of petition of intervention, citation, &c., be served.

J. F. SMITH,
A. J. KEARNY, *Att'ys.*

THE STATE OF LOUISIANA,
Parish of Vernon:

I, W. J. Knight, do solemnly swear that the facts and allegations contained in the foregoing petition are true and correct, and that the Hon. S. D. Read, Judge of 14th Jud. Dist. of La., is a non-resident of Vernon Parish, and now absent from same.

W. J. KNIGHT.

Sworn to and subscribed before me, 14th day of October, 1882.
[SEAL.] WM. H. SMART,
Cl'k Dist. Court.

OFFICE OF CL'K DIST. COURT.

THE STATE OF LOUISIANA,
Parish of Vernon:

Let W. A. Carter, an Att'y at Law, of Leesville, La., be, and he is hereby appointed curator, *ad hoc,* to represent plaintiff, Elbert S. Jemison, in this cause, and upon whom copies of petition of intervention, citation, &c., be served, as prayed for.

In absence of Dist. Judge, done and signed by me, as witness, my hand and seal on this 14th day of October, 1882.

[SEAL.] WM. H. SMART,
Cl'k Dist. Court.

69 I hereby accept the above appointment, and do hereby accept service of copies of the original petition of intervention, citation, affidavits, order, this petition, &c., as made on me on this day, October, 1882.

W. A. CARTER,
Curator, ad hoc.

Filed 14th day of October, 1882.

WM. H. SMART,
Cl'k Dist. Court.

Attest:
A true copy of the original.
[SEAL.] J. J. HICKS, *Clerk.*

PAGES

In the District Court of Vernon Parish, Louisiana, 12th Judicial District, November Term, 1882.

No. 58.

ELBERT S. JAMISON
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

The plaintiff in the above numbered and entitled suit for answer to the petition of intervention filed therein by William J. Knight, the intervener in said suit, deny all and singular the facts and allegations contained in said petition of intervention, except the allegation that they have attached, as the property of the defendants in said suit, the property claimed by said intervener.

Plaintiff specially aver that said intervener's alleged title to said property is a pretended deed of sale to him from the defendants in said suit, and that said pretended deed of sale, and the pretended contract of sale evidenced by said deed, were and are a mere and fraudulent simulation and illegal, null and void.

Wherefore, plaintiffs pray that said intervener's demand may be rejected and dismissed by a final and definite judgment at said intervener's cost.

GEO. H. WELLS AND
W. A. CARTER,
Attorneys for Plaintiffs.

Filed Nov. 11, 1882.

WM. H. SMART,
Clk Court.

70 Attest:
A true Copy of the original.
[SEAL.] J. J. HICKS, *Clerk.*

In the 14th Judicial District Court of the State of Louisiana in and for the Parish of Vernon, November Term, 1883.

No. 58.

ELBERT S. JEMISON
vs.
D. R. KNIGHT ET AL., W. J. KNIGHT, Intervener.

By reason of the law and the evidence in the above numbered and entitled suit being in favor of the plaintiff and against the defendants therein, as to plaintiffs' moneyed demand in said suit, a trial having been had upon the merits after issue joined by answer, and the defendants in their answer, having admitted plaintiff's moneyed demand, and the Court considering the 3rd ground of defendants' motion to dissolve the attachment in said suit well taken, to-wit, the ground that the order of attachment is insufficient in

terms, it is ordered, adjudged and decreed that the defendants' motion to dissolve said attachment be and the same is hereby sustained upon the 3rd ground of said motion to dissolve the same, to-wit, on the ground that the order of attachment is insufficient in terms, and that said attachment for that reason, be and the same is hereby dissolved, and that the attached property be relieved from said attachment, and that the costs of said attachment be paid by Elbert S. Jemison, the plaintiff in said suit.

It is further ordered, adjudged and decreed that the plaintiff, Elbert S. Jemison, do have judgment for and recover from the defendants, Daniel R. Knight and John A. Lovett, *in solido,* the sum of eleven hundred and seventy-one 89/100 dollars ($1171 89/100), with eight per cent. per annum interest thereon from February 1, 1882, until paid, and all costs of said suit, except the costs of said attachment, and the cost of the intervention therein.

And by further reason of the law and the evidence in said suit being in favor of the intervener and against the plaintiffs therein, as to the intervention in said suit, it is further ordered, adjudged and decreed that said intervener, William J. Knight, do have judgment against said plaintiff, Elbert S. Jemison, recognizing and decreeing said intervener to be the rightful owner of the property attached in said suit, under and by virtue of said intervener's purchase thereof from said defendants, by the act of sale executed July 28, 1882, in evidence of said suit, which sale is hereby decreed to be a real and not a simulation, and that said intervener do have judgment for and recover from said plaintiff, Elbert S. Jemison, all costs of the intervention in said suit, including the sum of ten dollars to be taxed with the costs of said intervention for the fee allowed by law to W. A. Carter, Esq., plaintiff's curator, *ad hoc,* in the matter of said intervention.

71

Done, read and signed in open Court, November 8, 1883.

STEPHEN D. READ,
Judge 14th Judicial District of the State of Louisiana.

Filed Nov. 8, 1883.

WM. H. SMART, *Clk.*

Attest:
A true copy of the original.
[SEAL.]

J. J. HICKS, *Clerk.*

Indorsed: Elbert S. Jemison, *vs.* Dan R. Knight, *et al.,* W. J. Knight, Intervener. Filed Feb'y 16th, 1904. W. Jackson, Clerk.
2nd Indorsement: Filed in evidence "G," Oct. 31/06, in suit No. 276. W. Jackson, Clerk.

Verdict of Jury.

We the jury find verdict in favor of plaintiff.
Nov. 1st, 1906.

W. B. McCORMICK, *Foreman.*

Indorsed: No. 276. Knight *vs.* Lutcher & Moore Lbr. Co. Verdict of Jury. Filed Nov. 2nd, 1906. E. C. Jackson, Clerk.

72 In the United States Circuit Court in and for the Western District of Louisiana, City of Shreveport.

No. 276.

WM. H. KNIGHT ET ALS.
vs.
H. J. LUTCHER ET ALS.

In the above cause, by virtue of the verdict of the jury finding in favor of the plaintiffs in the above cause, the law and evidence being in favor thereof, it is ordered, adjudged and decreed that the plaintiffs, William H. Knight, John A. Lovett, Miss Stella Knight and Mrs. Florence Knight, wife of James Durham, do have and recover judgment against the defendants, H. J. Lutcher, and the Lutcher & Moore Lumber Company, decreeing the plaintiff to be owners of an undivided one-half interest in and to the following described lands set forth in the plaintiffs' petition in this cause, as follows, to-wit:

South half of Section Thirty-three (33), in Township One (1), south of Range Eleven (11), West; Southeast quarter of Northwest quarter, Southwest quarter of Northeast quarter, west half of Southeast quarter, and East half of Southwest quarter of Section Five (5), West half of Southwest quarter of Seventeen (17), Northeast quarter of Southeast quarter of Section Eighteen (18), East half of Northwest quarter and Northeast quarter of Northeast quarter of Section Twenty (20); North half of North half of Section Twenty-one (21); Northwest quarter of Northwest quarter of Section Twenty-two (22); South half of the Northeast quarter, Southeast quarter of Northwest quarter, West half of Southwest quarter, Northeast quarter of Northwest quarter and the Northwest quarter of Southeast quarter of Section Twenty-three (23); Southwest quarter of Northwest quarter of Section Twenty-four (24); and the Northwest quarter of the Northeast quarter of Section Thirty-four (34); all in Township Two (2), south of Range Eleven (11), West; in the Parish of Vernon, State of Louisiana, and as such that they be put in possession of the same.

It is further ordered, adjudged and decreed that the defendants pay all costs of the suit.

Thus done read and signed on this 3rd of November, 1906.

ALECK BOARMAN, *Judge.*

Indorsed: No. 276. Wm. H. Knight *et als. vs.* H. J. Lutcher *et als.* Judgment. Filed Nov. 3rd, 1906. E. C. Jackson, Dy. Clerk.

73 Circuit Court U. S., West. Dist. of La.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

In this case now comes defendants and shows unto the Court that the rulings of the Court and verdict of the jury in the above entitled cause are erroneous and contrary to the law and evidence, and that the following errors were committed therein:

In refusing to permit defendants to file in evidence the deposition of Dr. J. A. Lovett, showing the truth of the allegations in their answers herein, as fully set forth in bill of exceptions.

In refusing to permit the defendants to file in evidence the depositions of said Dr. J. A. Lovett, for the purpose of showing that the credit portion of the purchase price of the sale of July 28th, 1882, from Knight & Lovett, to W. J. Knight, was paid by the sale of the land in question, and in refusing them permission to prove by T. J. Word, the same state of facts.

In refusing permission to the defendants to file their third and amended and supplemental answer herein set forth in bill of exceptions.

In refusing to charge the jury with regard to the prescription of ten years, though requested by defendants to so charge the jury as shown in Bill of Exceptions No. 4.

In refusing to charge the jury that in order for the plaintiffs to recover, they must have shown that the community between their deceased mother and father had been liquidated and settled by judgment of the Court, as set forth in Bill of Exceptions No. 5.

In failing to charge the jury in regard to any phase of the law of the case.

For all of these errors committed by the Court, defendants ask that a new trial be granted them, and for judgment in their behalf and for which they will ever pray.

HOLLAND & HOLLAND,
MASON & WILLIAMS,
ALEXANDER & WILKINSON,
Attorneys.

74 Indorsed: No. 276. W. H. Knight *et al.*, *vs.* Lutcher & Moore Lbr. C. Motion for New Trial. Filed Nov. 3rd, 1906. E. C. Jackson, Dy. Clerk.

Circuit Court of the United States for the Western District of Louisiana.

No. 276.

W. H. KNIGHT
vs.
LUTCHER & MOORE.

In this cause it is ordered that the defendants have thirty days from this date in which to prepare and file bills of exceptions and to submit and take a writ of error from the proceedings had in the above cause.

Done and signed officially on this 17 day of November, 1906.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. W. H. Knight *vs.* Lutcher & Moore Lumber Co. Order granting time for filing Bills of Exception and Writ of Error. Filed Nov. 19th, 1906. W. Jackson, Clerk.

U. S. Circuit Court, West. Dist. of La.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

Be it remembered that on the trial of the above case counsel for the defendant offered in evidence the depositions of Dr. J. A. Lovett, a material and competent witness in their behalf which are hereto annexed and made part of this exception, for the purpose of proving the allegations in their answers in said cause which was objected to by counsel for the plaintiffs for the following reasons:

1st. That parole testimony cannot be introduced to change vary or prove title to real estate.

2nd. That what ever title the defendant claim in this case is derived from W. J. Knight, & they are estopped from attacking title of W. J. Knight.

75 3rd. That defendants are not shown to — creditors of Knight & Lovett, and therefore have no interest in contesting the deed from Knight & Lovett to W. J. Knight.

4th. That the plea of *res judicata* filed in this case is binding on defendants.

5th. That the allegations of defendants' answer of fraud or error, in any manner, shape or form.

Which objections were sustained by the Court and the defendants by counsel then and there excepted and reserved this their bill of exceptions at the time, which was read, signed and filed on this the 17th day of November, 1906.

ALECK BOARMAN, *Judge.*

The above has been submitted to me.

A. J. MURFF.

(Indorsed:) No. 276. W. H. Knight *et al., vs.* Lutcher & Moore L'b'r Co. Def'ts' Bill of Exceptions No. 1. Filed Nov. 19th, 1906. W. Jackson, Clerk.

* * * * * * *

Direct Interrogatories to Dr. J. A. Lovett.

Attached to Defendants' Bill of Exceptions No. 1.

First. Please state your name, age and residence.

Second. Did you ever live in Vernon Parish, Louisiana, and if so when and how long?

Third. Please state what was your business in Vernon Parish, La.; and if you have stated that you — a member of the firm of Knight and Lovett, please state the initials of Mr. Knight, and state what relation you bore to him, if any, and what relation you are to William H. Knight, and to W. J. Knight, and what relation was Dan R. Knight to W. J. Knight and to William H. Knight.

76 Fourth. In July, 1882, you were a member of the firm of Knight and Lovett, were you not?

Fifth. On file in the papers in this case is a deed or act of sale dated July 28, 1882, wherein Knight and Lovett, a firm composed [of] Dan R. Knight and J. A. Lovett, deeded the land in controversy in this suit, and all their movable property, to W. J. Knight. The consideration expressed in the deed is five hundred dollars cash, and fourteen thousand five hundred dollars due on November 1, 1882. Please state what was the actual consideration for this deed or act of sale, and why was it made.

Sixth. Please state fully the circumstances leading up to said act of sale, and state fully what was the understanding or agreement between the firm of Knight and Lovett and W. J. Knight in regard to said act of sale.

Seventh. Please state whether or not the five hundred dollars in cash recited in said deed was paid by W. J. Knight; and if it was paid, whose money was it, and where did W. J. Knight get the money, and who from, and for what purpose?

Eighth. Please state whether or not the note for fourteen thousand five hundred dollars ($14,500.00) was executed by W. J. Knight and delivered to Knight and Lovett; and if so, what was afterwards done with the note.

Ninth. Please state whether or not W. J. Knight ever paid Knight and Lovett said note of fourteen thousand five hundred dollars, or any part of it; and if not, why not.

Tenth. Please state fully what was the purpose of executing said act of sale.

Eleventh. After said act of sale or deed was executed, did the property mentioned in said act of sale and deed belong to W. J. Knight or was it the agreement that it still belonged to Knight and Lovett.

Twelfth. Is it or not a fact that said act of sale was executed by Knight and Lovett to W. J. Knight for the purpose of placing the property in the hands of W. J. Knight, who was to hold it as the agent for Knight and Lovett, and was to dispose of it, and turn the proceeds over to Knight and Lovett, and said W. J.
77 Knight was to receive his salary for his services in the matter?

Thirteenth. Please state fully what was the agreement with W. J. Knight in regard to said property and said act of sale—giving all the details.

Fourteenth. Was the understanding with W. J. Knight prior to the execution of the act of sale?

Fifteenth. If you have said that W. J. Knight was to take said property and handle it as the agent of Knight and Lovett, and was to convert the movable property into cash and divide the proceeds between yourself and Dan R. Knight, and was to either hold the real estate for Knight and Lovett and convey it back to you, or sell it and give you the proceeds—please state whether or not W. J. Knight executed said trust or performed the agreement he made with Knight and Lovett at the time he accepted said agency.

Sixteenth. If in answer to the above interrogatory you have said that he did perform said trust, then please state how, and in detail.

Seventeenth. There is on file in the papers of this case in this Court an act of sale, or deed, dated February 5, 1887, wherein W. J. Knight conveyed an undivided one half interest in the land in controversy in this suit to Viola P. Knight. Who was Viola P. Knight, and why was this conveyance made by W. J. Knight to Viola P. Knight?

Eighteenth. What was the consideration for the transfer from W. J. Knight to Viola P. Knight?

Nineteenth. If you have said that W. J. Knight conveyed an undivided one-half interest in the land in controversy to Viola P. Knight, the wife of Dan R. Knight, in order to carry out his agreement to hold said real estate until Knight and Lovett directed him either to sell it or to convey it back to him—then please state what became of your one-half interest in the land.

Twentieth. On file in the papers in this case is an act *is an act* of sale or deed dated February 7, 1887, wherein W. J. Knight conveyed an undivided one-fourth in this land to J. C. Knight.
78 Who was J. C. Knight, and what was the consideration for the deed from W. J. Knight to J. C. Knight of an undivided one-fourth interest in this land? Who received the consideration paid by J. C. Knight for this one-fourth interest?

Twen*tieth*-First. If in answer to the above interrogatory you say that you sold one half of your one half interest, to-wit, one fourth interest, in the land in controversy in this suit, to J. C. Knight, and that you received the consideration therefor—please state what you did with the other one fourth interest you owned in the land at that time.

Twenty-Second. If you have said that on February 7, 1887, you sold J. C. Knight one half of your one half interest, and J. C. Knight paid you for it, and you instructed W. J. Knight to convey a one

fourth interest in the entire land to J. C. Knight and that W. J. Knight at that time purchased the other one fourth interest that you still owned in the land—then please state whether or not this was the first time that W. J. Knight really owned any interest in the land.

Twenty-Third. Please state when W. J. Knight first paid you any money for an interest in the land, and how much interest he acquired.

Twenty-Fourth. At the time that Knight and Lovett conveyed the land to W. J. Knight state whether or not you intended that he should own the land, or was he simply made your trustee or agent.

Twenty-Fifth. Who is James Cavenaugh, and what position did he occupy with the firm of Knight and Lovett in 1882?

Twenty-Sixth. Please state whether or not W. J. Knight in 1882 paid Knight and Lovett anything of his own for the land in controversy in this suit.

Twenty-Seventh. Please state when was the first time W. J. Knight had ever paid anything at all for any part of this land.

Twenty-Eighth. If in answer to the preceding interrogatory you have stated that the first time W. J. Knight ever paid anything for any interest in this land was in 1887—then please state why
79 and under what agreement he was holding the land prior to that time.

ALEXANDER & WILKINSON,
HOLLAND & HOLLAND,
MASON WILLIAMS,
For Defendants.

In the United States Circuit Court for the Western District of Louisiana.

No. 276.

WILLIAM H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Now comes the plaintiff-, William H. Knight, *et al.*, by counsel and specially reserving all rights to object to the testimony sought to be gained from Dr. J. A. Lovett, and by no means intending to waive any rights by this *X amination* [cross examination], propounds the following questions to Dr. J. A. Lovett:

First. Were you not a witness in a suit in Vernon Parish, Louisiana, in 1883, entitled Albert S. Jemison *vs.* D. R. Knight *et al.* W. J. Knight, Intervener and 3rd opponent, No. 58, on said Court docket, wherein the plaintiffs, Albert S. Jemison, seized part of the property included in the sale of July 28th, 1882, made by D. R. Knight and yourself, as Knight & Lovett to W. J. Knight and attempted to make it subject to the debts of Knight & Lovett, and wherein W. J. Knight intervened and claimed ownership by virtue of the sale to him by Knight & Lovett of July, 1882?

Second. Did you not, as a witness in said cause, mentioned in first interrogatory, swear in open Court under solemn oath that the sale of July 28th, 1882, in which the land in this suit was included, made by D. R. Knight and yourself, as Knight & Lovett to W. J. Knight, was a *bona fide* sale, made in good faith, or words to that effect.

Third. Did you not also swear in open Court on same trial that the five hundred dollars mentioned as part of the cash price in said sale of July 28, 1882, was paid by W. J. Knight to Knight & Lovett? And that the note for $14,500 given as part of purchase price by W. J. Lovett to Knight & Lovett was paid by W. J. Knight, or words to that effect?

80 Fourth. Were you not a witness in the District Court of Vernon Parish, Louisiana, in 1883, in which McIlhenny Company, in suit No. 60 of said Court, entitled McIlhenny Company *vs.* Knight & Lovett, W. J. Knight Intervener and 3rd opponent, wherein there was contest as to the validity of sale of July 28, 1882, made by Knight & Lovett or D. R. Knight and J. A. Lovett to W. J. Knight?

Fifth. If you state that you were state if you did not swear in that case before said Court, that the sale of July 28, 1882, made by you and D. R. Knight to W. J. Knight, in which the land now in controversy was included, was a *bona fide* sale, and that W. J. Knight paid both the cash and credit consideration of the sale, or words to that effect?

Sixth. Did you not testify in this case, when it was up for trial before Judge Boarman at Shreveport, in 1905, that you had sq sworn before the District Court of Vernon Parish in said cases in 1883, and that you, by your testimony, led the Court to believe that it was a *bona fide* sale?

Seventh. If in answer to direct interrogatories propounded by defendants you now answer that *is* [it] was not a *bona fide* sale, and that you had mislead the Court, please state whether you were swearing falsely in the Vernon District Court in said causes of Albert S. Jemison *vs.* Knight & Lovett, W. J. Knight 3rd opponent and McIlhenny Company *vs.* Knight & Lovett W. J. Knight 3rd opponent, or swearing falsely now?

A. J. MURFF &
M. J. CUNNINGHAM, JR.,
Attorneys for Plaintiffs.

(Indorsed:) No. 276. Wm. H. Knight *et al vs.* Lutcher & Moore Lbr. Co. Direct Interrogatories to Dr. J. A. Lovett.

Direct Interrogatories to Dr. J. A. Lovett, Attached to Def'ts' Bill of Exception No. 1.

THE UNITED STATES OF AMERICA,
Eastern District of Texas, the State of Texas,
County of Liberty, ss:

The examination of witness *de bene esse* beginning on the
81 13 day of June, 1906, on behalf of the defendants, before me, J. F. Dabney, a notary public in and for Liberty County, Texas, at my office in the town of Liberty, in the said district of Texas, in the State and county aforesaid, in a certain suit now pending and undetermined in the Circuit Court of the United States for the Western District of Louisiana, at Shreveport, in said district, wherein Wm. H. Knight, *et al.*, are plaintiffs, and Lutcher & Moore Lumber Company, *et al.*, are defendants.

Dr. J. A. LOVETT, a witness produced on behalf of the defendant, being first duly sworn deposes and says as follows:

To the First Answer. My name is J. A. Lovett, my age is 54 years; my residence is Liberty County, Texas.

Second. I live in Vernon Parish, La., from 1855 to 1881 or 1882.

Third. I practiced medicine and was engaged in the timber and mercantile business. I was a member of the firm of Knight and Lovett. D. R. Knight was the name of my business partner; he was my uncle. I am a cousin to William H. Knight and a cousin to W. J. Knight. Dan R. Knight was an uncle to William H. Knight.

Fourth. Yes.

Fifth. That was the actual consideration passed, but the object was to protect ourselves against our creditors at that time.

Sixth. We lost a lot of timber in the overflow of Sabine river and were owing a lot of debts in Galveston and Orange, and other places, but principally in Galveston and Orange and we made this sale for the purpose of protecting ourselves against those debts. It has been so long ago that I can not give a detailed account of all the circumstances leading up to the transaction, but the above is general statement of same. The understanding was that W. J. Knight would hold the property for us, and that on the surrender of his note and the $500.00, he was to deed the property back to us.

Seventh. The money was paid as recited. To the best of my recollection the money belonged to Knight & Lovett, but I can
82 not be positive about that now. I am not positive that it was as much as $500.00 either, but I know there was some paid; I do not now remember definitely the amount. It was for the purpose of closing that deal.

Eighth. Yes. It was returned to him when he transferred a lot of the property back to the parties. In the meantime D. R. Knight and I had dissolved partnership, and also D. R. Knight's wife had sued him for a partition of their property. W. J. Knight transferred to D. R. Knight's wife the interest of D. R. Knight in the land.

The proceeds of the sale of the personal property were paid to D. R. Knight and myself.

Ninth. He paid it by returning the real property and personal property as stated in answer to 8th interrogatory.

Tenth. I answered this in answer to 6th direct interrogatory. Also in answer to 5th direct interrogatory.

Eleventh. It was agreed between us that it was to belong [to] Knight & Lovett.

Twelfth. Yes.

Thirteenth. I can not give it in detail, because I do not now remember it all, but it was understood that W. J. Knight was to be the agent of Knight & Lovett and return the property to us, and we were to pay him a salary for his services.

14th. Yes.

15th. Yes, that was the agreement, except that he was not to sell any of the real estate. He performed the agreement, except that he did not convey any of the land back to me.

16th. He performed the trust as stated in answer to 15th, 8th and 9th direct interrogatories.

17th. Viola P. Knight was the wife of D. R. Knight. I do not know of my own knowledge why the conveyance was made to Viola P. Knight, but it is my understanding that it was transferring D. R. Knight's interest in the land to his wife to be held by her for D. R. Knight.

18th. I do not know.

19th. My understanding, as well as I now recollect, is that
83 I sold my interest in the land to W. J. Knight and J. C. Knight or W. J. Knight and Viola P. Knight, I do not remember which, but I think there were two of them in the transaction with me. There was no necessity for a deed to be made to me as I sold to them, and the property was already in W. J. Knight's name.

20th. J. C. Knight was a cousin of W. J. Knight. I do not know what the consideration of the deed was. They gave me so much money for my interest, and they arranged the matter between themselves, and I do not know what they did.

21st. I sold all of my interest in the land to W. J. Knight and J. C. Knight, as best I now recollect, but I do not now remember who paid me the money for it, nor do I know what they did between themselves with it. I owned a one-half interest in the land.

22nd. I did not sell any one-fourth interest to any one, but sold my entire one-half interest to them, and do not know what arrangements they afterwards made. This was the first time that he owned any interest in the land under our original agreement between Knight & Lovett and W. J. Knight.

23rd. I do not remember how much he paid for the land, but it was prior to the execution of the deed from W. J. Knight to J. C. Knight. My understanding was that I sold the land to W. J. Knight and J. C. Knight in partnership, but I do not know what interest each had. I sold all my interest at one time.

24th. He was just to hold it as trustee or agent for us.

25th. He was bookkeeper and clerk for Knight & Lovett in 1882.

26th. The original transaction as before testified to in these answers is all that he paid Knight & Lovett in 1882.

27th. The original transaction, as testified to, in 1882, and in 1887, when he and J. C. Knight bought my interest in it, were the only times that he paid anything for the land that I know of. He paid other money at times, but it was the proceeds of the sale of the personal property.

28th. He was holding the land prior to that time as trustee or agent, under our original agreement.

84 *Answers of the Witness, Dr. J. A. Lovett, to Cross Interrogatories Propounded by Plaintiffs, William H. Knight, et al.*

First. I was a witness in several suits by creditors against D. R. Knight *et al.*, and there were some in which I was not a witness, and I do not remember whether or not I was a witness in the suit mentioned.

2nd. I do not remember what my testimony was in any of those suits, and I do not remember whether or not I testified in that particular suit.

3rd. I do not recollect what my testimony was in those cases.

4th. I do not recollect what my testimony was in those cases, and do not remember whether or not I testified in that particular case.

5th. I do not remember, as I have already stated.

6th. My memory is that I testified before Judge Boarman that I did not recollect, but I suppose that if I testified at all I did so testify.

7th. I do not remember what I testified to before in those cases.

J. A. LOVETT.

Sworn to and subscribed before me, this the 13th day of June, 1906.

[SEAL] J. F. DABNEY,
Notary Public, Liberty Co., Texas.

* * * * * * *

(Indorsed:) No. 276. In Circuit Court of United States for Western District of Louisiana. Wm. H. Knight, *et al.*, *vs.* Lutcher & Moore Lumber Co., *et al.* Depositions of the Witnesses, Dr. J. A. Lovett.

85 Circuit Court U. S. West. Dist. of La.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

Be it remembered, That on the trial of this case counsel for the defendant tendered an amended and supplemental answer in words and figures as follows:

United States Circuit Court, Western District of Louisiana.

No. 276.

WM. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO. ET AL.

In this case now comes the defendant and adopting all of the allegations and prayers of the original and amended answers heretofore filed by them, for further answer to the demands of the plaintiff aver in the alternative that if it be held that the said sale from Knight & Lovett to W. J. Knight of the property in contest was a valid sale, that then and in that event defendants aver that the note for fourteen thousand five hundred dollars, representing the credit portion of the said sale of July 28th, 1882, from Knight & Lovett to W. J. Knight, was paid only by the said [sale] of the property mentioned in said act, that is to say, that the said note of fourteen thousand five hundred dollars was a valid claim against the community existing between said W. J. Knight and the mother of said plaintiff, and the said note was paid by the proceeds of sale of the property here in contest and that the said heirs of the said Mrs. Knight cannot contest the title of said property without paying their share of the community debts so paid out of the proceeds of sale of said property, and no suit can be maintained by them without paying one-half of fourteen thousand five hundred dollars so paid by the sale of said property, which amount enured to their benefit in the payment of a community debt for which the said plaintiffs were equally bound with the said W. J. Knight.

Wherefore defendants pray that this amended answer may be filed and for judgment rejecting the demands of the plaintiff at their cost, and for general relief.

ALEXANDER & WILKINSON,
HOLLAND & HOLLAND,
MASON WILLIAMS,
Attorneys for Defendants.

86 To the filing of which counsel for the plaintiffs objected that same came too late, and changed the issues for the defense, and that same was in fact a plea of want of tender which should have been *filed in limine litis*, which objections were sustained by the Court and the filing of said amended and supplemental answer refused and denied by the Court. Said amended answer was only tendered after the Court had refused to permit the introduction of the evidence of Dr. J. A. Lovett, and counsel for the defendants were surprised by such ruling of the Court in rejecting the said evidence on account of the fact that when said case was first tried in said Court, the presiding judge passed on its admissibility and permitted such evidence to be received, and counsel were of the opinion that the ruling of the Court in the present trial would be the same as on the former trial, and therefore took no steps to provide for the

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ontingency of a change in the opinion of the Court by amending heir answers so as to clearly make such evidence admissible.

To which ruling of the Court counsel for the defendants then and here excepted and reserved this their bill of exceptions which was read, signed and filed on this the 7 day of November, 1906.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lbr. Co. Defts. Bill of Exceptions No. 2. Filed Nov. 19th, 1906. W. Jackson, Clerk.

U. S. Circuit Court, West. Dist. of La.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

In this case after the Court had refused permission to file the amended and supplemental answer, set forth in bill of exo-ption No. 2, counsel for the defendants offered the evidence of Dr. J. A. Lovett taken under commission and made part of himm [bill] of exception No. 1, which is specially referred to as a part hereof, and the witnesses T. J. Word and A. W. McCranie, good and competent witnesses for the purpose of showing that the fourteen thou-
87 sand five hundred dollars note, mentioned in the act of sale of date July 28th, 1882, from Knight & Lovett to W. J. Knight of the land in controversy, which deed and act of sale is hereto attached as a part hereof, was paid by W. J. Knight after the death of his wife, the mother of the plaintiffs, by the sale of the land in controversy and that the proceeds of sale of the land in controversy was used to pay the part of the purchase price aforesaid which was secured by a vendors privilege on said land, and that the identical proceeds of sale of said land in controversy was used only for that purpose such offering of evidence being for the purpose of forcing said plaintiffs to refund or pay one-half of said note of $14,500.00 which was a community debt, before they should claim any part of the land in question.

Which evidence was objected to by counsel for the plaintiffs on the grounds that:

1st. That under allegation of defendants answer they have not set up any settlement of the community between W. J. Knight and his deceased wife and they should not be allowed to contest the same.

2nd. That defendants have no right to demand such settlement or attach the same in this collateral manner.

3rd. That the receipted note is best evidence of its payment.

4th. That the amendment is in the nature of a want of tender and comes too late, and is inconsistent with original and changes the issue, and should not be allowed after the case has gone to trial.

Which objections were sustained by the Court and the said evi-

dence excluded and no evidence in support of such theory or contention was permitted by the Court to be heard by the jury trying the case, to which ruling of the Court counsel for the defendants then and there excepted and reserved this their bill of exceptions which was read, signed and filed on this the 17 day of November, 1906.

ALECK BOARMAN, *Judge.*

The above has been submitted to me.

A. J. MURFF, *Att'y for Plaintiff.*

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher
88 & Moore Lbr. Co. Defts. Bill of Exceptions No. 3. Filed Nov. 19th, 1906. W. Jackson, Clerk.

Circuit Court of U. S., West. Dist. of La.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

Be it remembered that in this case, defendants had plead the prescription of ten years in bar of plaintiffs rights and had filed and placed in evidence an authentic act of sale to them of the land in question of date 1889, and had shown that they had paid the taxes on said land since their purchase, the same being wild or woodland, before the jury retired requested the Court to charge the jury then trying the case as follows:

"The defendants in this case have filed a plea of ten years prescription, urging that they have held the property in question under a just title and in good faith for more than ten years before this suit was brought. I charge you that the title under which they hold may be denominated a 'just title,' valid on its face, and if you find that they have held such title for more than ten years, in good faith believing that they were the owners of the property, then I charge you that the plea of prescription ought to be sustained, unless the evidence has shown some fact that would prevent the running of prescription against the plaintiffs."

Which charge the Court refused to give, nor did the Court cover said requested charge in its general charge to the jury, to which ruling of the Court counsel for defendants before the jury retired and in their presence then and there excepted.

To which refusal of the Court to so instruct the jury counsel for defendants then and there excepted and presents this their bill of exceptions which was signed and filed on this the 7 day of November, 1906.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lbr. Co. Defts. Bill of Exceptions No. 4. Filed Nov. 19th, 1906. W. Jackson, Clerk.

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89 Circuit Court U. S., West. Dist. La.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

Be it remembered that on the trial of this case counsel for defendants requested the Court to charge the jury as follows:

"C."

In this case the plaintiffs claim as heirs of their mother one half interest in the property in question on the ground that it was [the word "No" on margin of sheet] bought during the lifetime of their mother, during the existence of the community of acquets and gains between her and their father, W. J. Knight, and was sold by their father after the death of their mother. I charge you that in order for them to recover that it is necessary for them to show that the community between their father and mother has been settled and liquidated by the payment of its debts, and until they do so they cannot recover any interest in any specific piece of property. No.

Which said special charge was not covered by the Court in his general charge to the jury, and no evidence had been received showing that the community between W. H. Knight and his deceased wife, the mother of the plaintiffs, had been liquidated and settled, and the residium of such community ascertained, which charge the Court refused to give to the jury. By the Court:

To which ruling of the Court in refusing such instructions counsel for defendants then and there excepted before the jury retired, and present this their bill of exceptions, which was signed and filed on this the 7 day of November, 1906.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lbr. Co. Defts. Bill of Exceptions No. 5. Filed Nov. 19th, 1906. W. Jackson, Clerk.

90 Circuit Court U. S., West. Dist. of La.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO. ET AL.

Be it remembered that in the above entitled case counsel for defendant moved and asked the Court to grant a new trial on the grounds and for the reasons set forth in said motion which is hereto

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annexed and made part hereof, which motion for a new trial was overruled by the Court.

To which ruling of the Court counsel for defendants then and there excepted and reserved this their bill of exceptions, which was read, signed and filed on this the 7 day of November, 1906.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lbr. Co. Defts. Bill of Exception No. 6. Filed Nov. 19th, 1906. W. Jackson, Clerk.

United States Circuit Court, Western District of Louisiana.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

The defendants, Lutcher & Moore Lumber Company, and G. Bedell Moore and H. J. Lutcher, represents to the Court that herein on or about the 3rd day of November, 1906, this Court entered judgment herein in favor of the plaintiffs and against these defendants in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue to the United States Circuit Court of appeals for the Fifth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals, and
91 until such hearing is had, that no further proceedings be had in your said Court.

ALEXANDER & WILKINSON,
HOLLAND & HOLLAND,
MASON WILLIAMS,
Attorneys for Defendants.

Circuit Court for Western District of Louisiana.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

This the 17th day of November, 1906, came the defendants by their attorneys and filed herein and presented to the Court their petition praying for a writ of error intended to be urged by them, also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit [Court] of Appeals

for the Fifth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendants giving bond according to law in the sum of five thousand dollars, which shall operate as a supersedeas bond.

Done and signed officially on the date above written, 17th Nov., 1906.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore Lumber Co., *et al.* Petition for Writ of Error and Appeal and Order of Granting Same. Filed Nov. 19th, 1906. W. Jackson, Clerk.

In United States Circuit Court for Western District of Louisiana.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LBR. CO.

92 The defendants in this action in connection with their petition for a writ of error, makes the following assignment of errors, which they aver occurred upon the trial of the cause, to-wit:

1. The Court erred in the rejection of evidence offered by the defendants in the following instances, to-wit:

(*a*) In rejecting the evidence of Dr. J. A. Lovett, who in effect testified that the land in controversy formerly belonged to a partnership known as "Knight & Lovett" of which the witness was the junior member, who in order to confer on W. J. Knight, the father of the plaintiff, the fullest powers of agency, purported to transfer to him the land in controversy for a stated consideration of fifteen thousand dollars, five hundred of which purported to have been paid in cash and the balance in one note for fourteen thousand five hundred dollars, due at one month. But that the five hundred dollars purporting to have been paid in cash was the money of Knight & Lovett, and the fourteen thousand five hundred dollar note was never paid by W. J. Knight in any way until long after the death of his wife, and that then it was paid in carrying out the agreement made before and at the time of the sale to W. J. Knight on July 28th, 1882, whereby W. J. Knight agreed to hold the property in question as the trustee and agent of Knight & Lovett. That in all of the sales made of the property in controversy by W. J. Knight, the father of the plaintiff, after the death of his wife and their mother, the proceeds of such sale were delivered to Knight & Lovett, the former vendors, in pursuance of said agreement, as will fully appear by the testimony of said Dr. Lovett attached to and forming part of the defendant's bill of exception No. 1.

2. In rejecting that portion of the evidence of Dr. J. A. Lovett, a witness for the defendants, which was offered to show and which

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did show that the credit portion of the purchase price of W. J. Knight from Knight & Lovett, on date July 28th, 1882, was paid in and about 1889, out of the sales made by W. J. Knight of the land in controversy, and that the proceeds of such sale so made by W. J. Knight were used to pay the credit portion of such purchase price as will fully appear by the testimony of said J. A. Lovett annexed and forming a part of defendant's bill of exception No. 1, and as fully set forth in defendant's bill of exception No. 3.

(*a*) In excluding the testimony of the witnesses T. J. Word and A. W. McCranie, offered on behalf of the defendants to show that the credit portion of the purchase price of the sale from
93 Knight & Lovett to W. J. Knight of date July 28th, 1882, to the land in controversy was paid after the death of the wife of W. J. Knight, the mother of the plaintiffs by the sale of the land in controversy, and that the proceeds of the said sale of land in question was used to pay the credit portion of the purchase price mentioned in said sale, which was secured by a vendor's privilege on said land, and that the identical proceeds of sale of said land in controversy was used only for that purpose, as all of which is fully set forth in defendants' bill of exception No. 3.

3. The Court erred in refusing to permit the defendants to file their third amended answer, which is attached to and made part of defendants' bill of exception No. 2.

4. The Court erred in making the charge to the jury in refusing to state propositions requested by the defendants in the following instances:

(*a*) In refusing to charge the jury as follows: there being evidence before the Court tending to support the charge thus requested and the same not having been covered by the Court's general charge.

"The defendants in this case have filed a plea of ten years' prescription urging that they have held the property in question under a just title and in good faith for more than ten years before said this suit was brought. I charge you that the title under which they hold may be denominated a just title, valid on its face, and if you find that they have held such title for more than ten years, in good faith believing that they were the owners of the property, then I charge you that the plea of prescription ought to be sustained, unless the evidence has shown some fact that would prevent the running of prescription against the plaintiffs."

(*b*) The Court erred in refusing to charge the jury in behalf of the defendants as follows:

"In this case, the plaintiffs claim as heirs of their mother, one half interest in the property in question on the ground that it was bought during the lifetime of their mother, during the existence of the community of acquets and gains between her and their father, W. H. Knight, and was sold by their father after the death of their mother. I charge you that in order for them to recover that it is necessary for them to show that the community between their father and mother has been settled and liquidated by the payment of its debts, and until they do so, they cannot recover any interest
94 in any specific piece of property." Which said special charge is fully set forth in defendants' bill of exception No. 5.

5. The Court erred in overruling the motion of the defendants for a new trial, as set *forther* [forth] in defendant's bill of exception No. 6.

6. The Court erred in entering judgment in favor of the plaintiffs and against the defendants.

Respectfully submitted,

ALEXANDER & WILKINSON,
HOLLAND & HOLLAND,
MASON WILLIAMS,
Attorneys for Defendants.

(Indorsed:) No. 276. W. H. Knight, *et al., vs.* Lutcher & Moore L'b'r Co., *et al.* Assignment of errors. Filed Nov. 19th, 1906. W. Jackson, Clerk.

Know all men by these presents, That we, the Lutcher & Moore Lumber Company, *et al.*, G. Bedell Moore and H. J. Lutcher, as principals, and J. D. Wilkinson as surety, are held and firmly bound unto W. H. Knight, *et al.*, in the full and just sum of five thousand dollars to be paid to said W. H. Knight, *et al.*, their certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of November in the year of our Lord one thousand nine hundred and six, 1906.

Whereas, lately at a term of the Circuit Court of the United States for the Western District of Louisiana in a suit depending in said Court, between W. H. Knight, *et al.*, and the Lutcher & Moore Lumber Company, *et al*, a judgment was rendered against the said The Lutcher & Moore Lumber Company *et al.*, and the said The Lutcher & Moore Lumber Company *et al.*, having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit (and a citation directed to the said The Lutcher & Moore Lumber Company, *et al.*, citing and admonishing them to be and appear before the United States Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

95 Now, the condition of the above obligation is such, that if the said The Lutcher & Moore Lumber Company, *et al.*, shall prosecute said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue,

[SEAL.] LUTCHER & MOORE LBR. CO.
[SEAL.] G. BEDELL MOORE &
H. J. LUTCHER,
By J. D. WILKINSON, *Attorney.*
J. D. WILKINSON, *Surety.*

Sealed and delivered in presence of:
W. JACKSON.

Approved:

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 276. W. H. Knight, *et al.*, *vs.* The Lutcher & Moore Lumber Company, *et al.* Bond. Filed Nov. 23rd, 1906. W. Jackson, Clerk.

Extracts from Minutes of Court.

SHREVEPORT, LOUISIANA,
THURSDAY, *October 18th, A. D.* 1906.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, Judge; Hon. M. C. Elstner, U. S. Attorney; A. C. Lea, United States Marshal; Walter Jackson, Clerk.

No. 276.

W. J. KNIGHT
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Motion and rule to show cause filed and set down for hearing on Tuesday next.

96 SHREVEPORT, LOUISIANA,
TUESDAY, *October 23rd, A. D.* 1906.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, Judge; Hon. M. C. Elstner, U. S. Attorney; A. C. Lea, United States Marshal; Walter Jackson, Clerk.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

Answer to rule and motion to suppress testimony of J. A. Lovett filed. Plea of estoppel and *res adjudicata* filed.

SHREVEPORT, LOUISIANA,
WEDNESDAY, *October* 31, *A. D.* 1906.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, Judge; Hon. M. C. Elstner, U. S. Attorney; A. C. Lea, U. S. Marshal; Walter Jackson, Clerk.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

According to previous assignment this case came on at this time to be heard upon the pleadings filed, the several pleas filed being

referred to the merits of the case: Whereupon came the following jurors, to-wit:

I. L. Heidingsfield, R. J. Webb, Geo. W. Newman, and D. I. Porter. The regular panel being then exhausted the Court ordered the marshal to summon twelve (12) tales jurors. Whereupon came the following tales jurors, to-wit: W. W. Otts, Leonard Wortman, H. A. Poleman, C. A. Waits, W. B. McCormick, J. Benson, H. Peisor and J. W. Isgrig; making in all twelve good and lawful men of the district, duly empaneled and sworn. The trial was then proceeded with, the evidence partly adduced and the hour for adjournment having arrived, the case was continued until to-morrow morning for further evidence.

97 SHREVEPORT, LOUISIANA,
THURSDAY, *November 1st, A. D.* 1906.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, Judge; Hon. M. C. Elstner, U. S. Attorney; A. C. Lea, U. S. Marshal; Walter Jackson, Clerk.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO. ET AL.

The trial of this case was this day resumed, the jury being again in Court. Counsel for defendants tender and offer to file an amended answer, to which counsel for plaintiffs object, and the Court being advised in the matter sustained the objection. Counsel for defendant then excepted to the ruling of the Court and reserved a bill of exception. The evidence was then concluded, and after argument of counsel, and charge of the Court, the jury retired to consider of their verdict.

The hour for adjournment having arrived the Court ordered that if the jury should find a verdict after the adjournment of Court they might seal the same and file it with the clerk and then be dismissed until to-morrow morning.

98 SHREVEPORT, LOUISIANA,
FRIDAY, *November 2nd, A. D.* 1906.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, Judge; Hon. M. C. Elstner, U. S. Attorney; A. C. Lea, U. S. Marshal; Walter Jackson, Clerk.

No. 276.

W. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO.

The jury in this case having found a verdict and handed same sealed to the clerk, and the jury being *against* [again] present in

Court, the Court opened the verdict, ordered the same to be read which being done was found to be in words and figures, to-wit:

"We, the jury, find verdict for plaintiff."

Novr. 1st, 1906.

W. B. McCORMICK, *Foreman.*

The Court ordered that the verdict be entered of record and the jury discharged from further consideration of this case.

SHREVEPORT, LOUISIANA,
SATURDAY, *November 3rd, A. D.* 1906.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, Judge; Hon. M. C. Elstner, U. S. Attorney; A. C. Lea, U. S. Marshal; Walter Jackson, Clerk.

No. 276.

WM. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO.

Motion for new trial filed and overruled. Counsel for the defendants excepts to the ruling of the Court and reserves a bill of exceptions. Judgment signed and filed.

99 SHREVEPORT, LOUISIANA,
SATURDAY, *November 3rd, A. D.* 1906.

No. 276.

WM. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER COMPANY.

Upon motion made the Court ordered that counsel for defendant be granted five days in which to prepare and file bills of exception reserved by him in this case.

SHREVEPORT, LOUISIANA,
TUESDAY, *November 6th, A. D.* 1906.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, Judge; Hon. M. C. Elstner, U. S. Attorney; A. C. Lea, U. S. Marshal; Walter Jackson, Clerk.

No. 276.

WM. H. KNIGHT ET AL.
vs.
LUTCHER & MOORE LUMBER CO.

Upon motion duly made the Court ordered that counsel for defendant be and he is allowed ten days additional time in which to

prepare and file bills of exception reserved by him on the trial of this case.

* * * * * * *

100 *Clerk's Certificate.*

UNITED STATES OF AMERICA: ..

Circuit Court of the United States, Fifth Circuit and Western District of Louisiana.

CLERK'S OFFICE.

I, Walter Jackson, Clerk of the Circuit Court of the United States for the Fifth Circuit and Western District of Louisiana, do hereby certify that the foregoing 122 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial in the case of William H. Knight, *et al., vs.* Lutcher & Moore Lumber Company, *et al.* No. 276 of the docket of the said Court.

Witness my hand and seal of said Court, at the City of Shreveport, Louisiana, this 3rd day of December, A. D. 1906.

[SEAL.] W. JACKSON, *Clerk.*

101 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States Circuit Court of Appeals, for the Fifth Circuit, do hereby certify that the foregoing printed record of 100 pages, in the case of

LUTCHER & MOORE LUMBER COMPANY, Plaintiff in Error,
against
WILLIAM H. KNIGHT ET AL., Defendant- in Error,

Numbered 1629,

was printed under my supervision, and is identical with the printed records upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 23rd day of January, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

102 Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday in November, A. D. 1906, at New Orleans, Louisiana, and on the third Monday in November, A. D. 1907, at New Orleans, Louisiana, before the Honorable Don. A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, Circuit Judges.

Be it remembered, that heretofore, to-wit, on the 10th day of December, A. D. 1906, a transcript of record, pursuant to a writ of error to the Circuit Court of the United States for the Western District of Louisiana, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Lutcher & Moore Lumber Company is plaintiff in error, and William H. Knight, *et al.*, are defendants in error, which said transcript of record was filed and docketed in said Circuit Court of Appeals, as No. 1629.

That thereafter the following proceedings were had in said cause in said Circuit Court of Appeals, viz:

Argument and Submission.

No. 1629.

LUTCHER & MOORE LUMBER CO.
vs.
WILLIAM H. KNIGHT ET AL.

MARCH 27, 1907.

On this day this cause was regularly called, and after argument by Geo. E. Holland, Esq., for plaintiff in error, and M. J. Cunningham, Jr., Esq., for defendants in error, was submitted to the Court.

And thereafter on December 10th, 1907, an opinion of said Circuit Court of Appeals was filed in said cause in words and figures following, to-wit:

103 *Opinion.*

Filed December 10, 1907. Charles H. Lednum, Clerk U. S. Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1629.

LUTCHER & MOORE LUMBER COMPANY, Plaintiff in Error,
vs.
WILLIAM H. KNIGHT ET ALS., Defendants in Error.

Writ of Error to the Circuit Court of the United States for the Western District of Louisiana.

Before Pardee, McCormick and Shelby, Circuit Judges.

By the COURT:

After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defence relied upon by plaintiff in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a Court of law, we therefore affirm the judgment of the Circuit Court.

And on the 10th day of December, 1907, in the record of the proceedings of said Circuit Court of Appeals, is a judgment in said cause in the words and figures following, to-wit:

Judgment.

No. 1629.

LUTCHER & MOORE LUMBER CO. ET AL.
vs.
WILLIAM H. KNIGHT ET AL.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Western District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiffs in
104 error, Lutcher & Moore Lumber Company, G. Bedell Moore and H. J. Lutcher, and the surety on the writ of error bond herein, J. D. Wilkinson, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court.

December 10, 1907.

And on December 26th, 1907, a petition for rehearing was filed in said cause in said Circuit Court of Appeals in words and figures following, to-wit:

Petition for Rehearing.

105 In the United States Circuit Court of Appeals, Fifth Circuit.

1629.

LUTCHER & MOORE LUMBER CO., Plaintiff in Error,
versus
WILLIAM H. KNIGHT ET AL., Defendants in Error.

Petition for Rehearing by George E. Holland, Attorney for Plaintiffs in Error.

U. S. Circuit Court of Appeals. Filed Dec. 26, 1907.
CHARLES H. LEDNUM.

106 In the United States Circuit Court of Appeals, Fifth Circuit.

LUTCHER & MOORE LUMBER CO., Plaintiff in Error,
versus
WILLIAM H. KNIGHT ET AL., Defendants in Error.

Petition for Rehearing.

To the Honorable Circuit Court of Appeals:

Come the plaintiffs in error in the above cause and respectfully move the court to set aside the judgment herein rendered on the 10th day of December, 1907, affirming the judgment of the United States Circuit Court for the Western District of Louisiana; and grant them a rehearing herein; and to permit this motion to be argued orally to the end that *that* said cause be reversed and the
107 plaintiffs in error granted relief not heretofore afforded them in this cause; and as grounds of this motion, the plaintiffs in error respectfully state:

I.

This cause was affirmed by this court, with the statement that it was the opinion of this Honorable Court that the matters of defense relied upon by the plaintiffs in error on the trial below in so far as they were not given consideration were of an equitable nature, not cognizable in a law court.

The trial court held all issues presented in this suit properly triable on the law side of his docket. Plaintiffs in error in the trial court asked permission to stay proceedings in this action until all equitable matters were determined in an action on the equity side of the docket. The trial judge refused this request, being of the

opinion that all the issues were properly triable in this cause. Defendants in error never at any time in the trial court or in this court suggested that any of the matters of defense were equitable and the suggestion first comes from this court in its opinion rendered affirming this cause. To permit this case to be settled in this manner, deprives plaintiffs in error of their rights and forces great hardship upon them, and we suggest to your honor, that in the state of this record, this is a cause wherein both sides of the docket have concurrent jurisdiction over the questions involved and any contention otherwise has been waived by the parties.

II.

108 Plaintiffs in error beg to suggest that if any equitable issues are presented in this suit, they are presented by plaintiff's cause of action, and if this court should refuse to consider all the issues presented because some are cognizable only in equity, then plaintiffs suit should be dismissed or transferred to the equity side of the docket and not defenses of plaintiffs in error, as has been done, for the obvious reason to-wit:

Plaintiff's title, if any they have, is by inheritance from their mother, as shown by their petition claiming the death of the mother and that the property sued for belonged to the community and her interest descended to them. The paper title is shown by their petition to be in the father and under very respectable authority, this statement of their title has been denominated an equitable and not a legal title. (See 62—Texas—613.)

Again plaintiff's cause of action consists solely of the removal of the cloud from their title as set out, caused by the deeds of the plaintiffs in error, from their father, and to accomplish this, evidence *aliunde* these deeds would have to be relied on and this character of action, we believe has been universally held to be cognizable only on the equity side of the docket of the Federal Courts, and a reading of the plaintiffs' petition, will disclose this to be their sole cause of action.

Again, the community interest of the wife's heirs is residuary. (9—La. Ann.—452.) Nothing can be claimed by them from the community of acquets and gains until the payment of all
109 community demands. (27—La. Ann.—624.) They are bound to await liquidation before their share is determined or can be recovered. (32—La. Ann.—848.) This seems to be the Louisiana law, and under it, the defendants in error, if entitled to anything would only be entitled to the residue after the payment of all community debts. They have never been put in possession of the land; there is no allegation that the community debts have been liquidated, and it therefore is purely an equitable question as to what, under the proof, they would be entitled to, if anything.

Again, defendants in error relied upon a deed to their father which showed on its face that the purchase money for the identical land had not been paid; the vendor's privilege outstanding; and under numerous authorities, the vendor retained the legal title and only an equitable title vested in the father of the defendants in

error or the community of himself and his deceased wife, thereby showing defendants in error to hold nothing more than such equitable title; that is, such equity as was in the father.

Plaintiffs in error would be willing to have all matters adjudicated in any court, but they must urgently submit to this Honorable Court that plaintiff's action is one sounding in equity and if either should be forced to that side of the docket, it should be defendants in error, and not your petitioners.

III.

Plaintiffs in error beg to suggest to this Honorable Court
110 that their defenses amount in effect only to a denial of plaintiff's case and the presumptions of fact arising thereon and they beg to suggest that proof of such denials, said proof negativing plaintiff's case can be properly heard in any court and showing this to be true; we beg to invite the court's attention to the fact that under plaintiff's case it was necessary for them to show that the land sued for belonged to the community. The deed to the father during the marriage relation raised in their favor a presumption of fact that this was true. This presumption, however, under authorities too numerous to cite, could be rebutted by any relevant proof showing same to be untrue. It therefore follows that such of the defenses urged as set up facts different from this presumption, were but a rebuttal or denial of the plaintiff's case on that point, and none of same were submitted to the jury, but should have been. Presumptions of fact are not conclusive and when challenged by relevant testimony, they become issues to be determined by the jury, together with other facts in the case. This record presents this character of defense; plaintiffs relying upon a presumption of fact disputed by relevant testimony from the defendants, sharply presenting the issue, and these plaintiffs in error are confronted with the proposition in this court that all of the testimony and pleadings rebutting this presumption of fact are equitable in their nature and not cognizable in law and we respectfully submit to this court that if it has jurisdiction over plaintiffs' action, such jurisdiction
111 ought to be broad enough in its scope to take in and hear all defenses amounting simply to a denial of that action.

Plaintiffs in error show a perfect legal record title. Defendants in error show that for them. This is not disputed. Their ownership and title to the property sued for is regular and is apparent from the deeds under which they hold. It is the title of the defendants in error that goes behind the apparent legal title and undertakes to establish a superior secret title. Certainly, then it is the action of the defendants in error, that sounds in equity and if not, then certainly plaintiffs in error, presenting a perfect legal title, could rebut by allegation and proof in any part any state of facts that would vitiate their title or show it inferior. Defendants in error if entitled to anything, are entitled to the residue after payment of community demands. By their proof, they have shown that the land that they sue for is encumbered by a community debt, a part of the purchase money. Then are we presumptious in asking the

court under this undisputed state of facts, what is the position of the defendants in error?

Bear in mind, plaintiffs in error have a perfect legal title. It is to escape this and go behind it that defendants in error have brought this action. Then how could it be that defendants in error go properly in a court of law and plaintiffs in error improperly there.

IV.

We beg to submit that this Honorable Court erred in not holding that plaintiffs in error could show by parol proof the true
112 consideration for the deed to the father of the defendants in error, such right being well established in law, being in rebuttal of plaintiffs' case, tending to rebut the presumption of fact that the property ever belonged to the community and no state of facts appearing making it necessary for plaintiffs in error to cure their perfect legal title or make it better on its face by any such proof. This proof only placed the jury in a position to determine whether the equitable title presented by defendants in error, the secret title—the title of the silent partner—the title that does not appear of record to warn the purchaser, was such an equity or was such an interest *in rem* as descended by inheritance to defendants in error and constituted in them a valid claim in the property as against the sale of their father and the perfect legal and record title passing from the active partner for value to the plaintiffs in error.

V.

We respectfully submit to this Honorable Court that error has been committed by you in not permitting plaintiff in error to rebut by the relevant testimony offered for that purpose, the presumption of fact arising from the conveyance to the husband during the life of the wife that the equitable title to the property conveyed belonged to the community. Such testimony offered by plaintiffs in error showing conclusively that the conveyance was solely one in trust valid under the decisions of the Supreme Court of Louisiana (37—S. Rep.—47) bestowing upon the trustee, or rather
113 the vendee, the widest latitude of agency. This proof being clearly in rebuttal of the action of defendant in error and their contention that the property in controversy belonged to the community.

It was incumbent upon the defendants in error to show a beneficial title in the property belonging to the community. The negative of this is shown when the survivor in community is shown to hold such title only in trust.

VI.

We submit that where the vendor's privilege is shown in a deed to the husband as outstanding, there is no presumption of law or fact that the community has or ever had any interest in the property more than the equity over and above the outstanding indebt-

edness and in this case, this should have been the limit of recovery allowed the defendants in error.

Fou-teen Thousand Five Hundred of the Fifteen Thousand Dollar consideration recited in the deed to plaintiffs' father showed on the face of that deed to be still unpaid. Five Hundred Dollars of the consideration in the land had been paid by the community, if anything, as this is shown by plaintiffs in offering their proof. This only placed on the face of the deed a contingent remote equity in the community and this is all the interest in the property the proof shows the community ever held.

The Supreme Court of the United States in speaking of this character of title says of it that it is "alienable, descendable and devisable in like manner as real estate held by legal title; but his title
114 is an equitable one, the legal title remaining in the vendor until the payment of the purchase price." (See 23—Wall.—119.)

VII.

We submit that this Honorable Court is in error in not reversing this cause and directing a verdict in favor of plaintiffs in error upon the undisputed record as presented to this court.

It is admitted that plaintiffs in error hold the legal record title without apparent flaw and without break from the sovereignty. They are, and have been for twenty years in constructive, if not actual, possession. They have paid all taxes during this twenty years and borne all burdens of government on the property without any assistance from defendants in error.

They are purchasers in good faith for value. This is *is* the attitude of the plaintiffs in error.

To defeat such a title, defendants in error we believe should have shown the following facts. 1st. Beneficial onerous title vested in the community. 2nd. The death of their mother. 3rd. The heirship. 4th. That they had been placed in possession of the property by the judgment of the court or that the community oved no debts. We believe we are safe in saying that these are necessary requirements before defendants in error would be entitled to any relief. If the assumption above is correct, defendants in error fall with the first proposition. Instead of a beneficial onerous title ves-ing in the community, the undisputed facts show (1st) a remote equity
115 in the community for an inconsiderable part of purchase price, the legal title and vendor's privilege outstanding as a charge against the identical land and as a community debt. (2nd) That the only title ever vesting in the ancestor of plaintiffs was one of agency—a trust relation—barren of any rights in the community. (3rd) A sale by the survivor in community of the identical property in payment of the identical debt shown to be outstanding as expressly authorized and required of him under the Louisiana law.

How, then, in the face of such a case, should defendants in error recover? What are they shown to be entitled to.

BLURR

VIII.

We understand this motion cannot be orally argued. In view of the fact that the case has been disposed of on questions not raised by either party, and not considered when this cause was submitted, and in view of the attitude of the trial court with reference to the defenses being at law and not in equity, and in view of the attitude plaintiffs in error have been placed in, because of this question having been determined adversely to its rights for the first time in this court, we beg permission of the court to orally argue and present the rights of plaintiff in error when this motion is submitted.

IX.

Plaintiffs in error respectfully pray the court to grant this
116 motion for rehearing, pass upon the entire case and grant to these plaintiffs in error such relief as the cause shows them entitled to, either reversing and dismissing plaintiff's cause of action or reversing and rendering this cause in favor of plaintiffs in error or remanding the cause to the trial court, directing what issues should be tried in equity and staying this cause until such trial can be had or instructing the trial court to submit to the jury the issues presented by the proof and giving to these plaintiffs in error a right somewhere at some time to have their rights determined and tried fully, and giving to them such relief as the justice of the cause demands.

Respectfully submitted,

GEO. E. HOLLAND,
Attorneys for Plaintiffs in Error.

I, George E. Holland, Counsel for the Plaintiffs in Error, in the above entitled cause, do hereby certify that I believe that the grounds for a rehearing presented in the foregoing motion are well taken and are good in law.

GEO. E. HOLLAND,
Attorney for Plaintiffs in Error.

117 And on January 1st, 1908, a petition to stay mandate was filed in said cause in said Circuit Court of Appeals in words and figures following, to-wit:

Petition to Stay Mandate.

118 1629.

In the United States Circuit Court of Appeals, Fifth Circuit.

LUTCHER & MOORE LUMBER CO., Plaintiff in Error,
versus
WILLIAM H. KNIGHT ET AL., Defendants in Error,

Motion by Plaintiff in Error to Withhold Mandate, Stay Proceedings, and Order Trial of the Equitable Issues, with Suggestion of Res Judicata and Waiver, by Geo. E. Holland, Attorney for Plaintiffs in Error.

U. S. Circuit Court of Appeals. Filed Jan. 1, 1908.
CHARLES H. LEDNUM, *Clerk.*

119 In the United States Circuit Court of Appeals, Fifth Circuit.

LUTCHER & MOORE LUMBER CO., Plaintiff in Error,
versus
WILLIAM K. KNIGHT ET AL., Defendants in Error.

Motion by Plaintiff in Error to Withhold Mandate, Stay Proceedings, and Order Trial of the Equitable Issues, with Suggestions of Res Judicata and Waiver.

To the Honorable Circuit Court of Appeals:

Come plaintiffs in error and respectfully show to this honorable court the following facts:

First.

That on December 21, 1903, plaintiffs in error filed their original bill against defendants in error in the Circuit Court of the
120 United States for the Western District of Louisiana numbered 286 in equity, in words and figures as follows, to-wit:

THE LUTCHER & MOORE LUMBER CO. ET AL., Plaintiffs,
vs.
WILLIAM H. KNIGHT ET AL., Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Western District of Louisiana:

The Lutcher & Moore Lumber Co., Henry J. Lutcher and G. Bedell Moore, bring this, their bill against William H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight Durham and her husband, James Durham, William J. Knight and Dan R. Knight, Sr., whereupon your orators complain and say:

I.

That the Lutcher & Moore Lumber Company is a corporation organized and existing under the laws of the State of Texas, domiciled and doing busi[illegible] at the town of Orange, Orange County, Texas; that Henry J. [illegible]cher and G. Bedell Moore are residents and citizens of the State of Texas, and each and all of the defendants are residents and citizens of the State of Louisiana, all of the defendants residing in Vernon Parish, Louisiana, except Dan R. Knight, who resides in Natchitoches Parish, Louisiana.

121 II.

That therefore, to-wit, on the 20th day of July, 1882, the defendant, Dan R. Knight, and one John A. Lovett, who is now a resident and citizen of the State of Texas, by an act of sale of said date, conveyed to William J. Knight, the following described lands situated in the Parish of Vernon and State of Louisiana and being more particulaaly described as follows, to-wit: The S. W. ¼ of S. E. ¼ and S. E. ¼ of S. W. ¼, Section 5 T. 2 S., Range 11, west. The N. ½ of N. E. ¼ of Sec. 32 and S. E. ¼ and S. ½ of N. E. ¼, Sec. 33, T. 1, S. R. 11, W. and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ and N. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼ and N. ½ of N. E. ¼, Sec. 5, T. 2, S. R. 11, W. and N. E. ¼ of N. E. ¼, Sec. 20, and N. W. ¼ of N. W. ¼, Sec. 21, T. 2, S. R. 11, W. and N. ½ of N. E. ¼, and N. E. ¼ of N. W. ¼, Sec. 21 and N. W. ¼ of N. W. ¼, Sec. 22, T. 2, S. R. 11, W. and fractional N. W. ¼ of fractional N. E. ¼ of Section (Six) 6, T. 2, S. R. 11, W. and S. ½ of N. E. ¼, Sec. 6, T. 2, S. 11, W. and N. W. ¼, of N. E. ¼ of Sec. 34, T. 2, S. R. 11, W. and E. 112 of N. W. ¼, Sec. 20, T. 2, S. R. 11 W. and S. ½ of N. E. ¼ and S. E. ¼ of N. W. ¼ of Sec. 23 and S. W. ¼ of N. W. ¼ of Sec. 24, T. 2, S. R. 11 W. and N. E. ¼ of N. E. ¼ of Sec. 6, T. 2, S. R. 11 W. and W. ½ and N. E. ¼ of S. E. ¼ and N. W. ¼ of S. E. ¼, Sec. 23, T. 2 S. R. 11 W. and 320 acres in Sec-. 33, 28, and 29 T. 1, S. R. 11 W.

122 III.

That at the time said act of sale was passed the said Dan R. Knight, Sr., and John A. Lovett were partners in business, that said John A. Lovett and W. J. Knight were nephews of Dan R. Knight, and that the said property was conveyed to W. J. Knight, without any consideration, passing from said W. J. Knight to the said Knight & Lovett; that said act of sale recited a consideration of $500 cash and a note for $14,500, which was payable on the first day of November, 1882, but that in truth and in fact the $500 cash which was paid in the presence of witness by W. J. Knight to said Knight & Lovett was the money of Knight & Lovett which had previously been given to said W. J. Knight for the purpose of making said cash payment before witness; that the note of $14,500 was executed and delivered to Knight & Lovett, but that the same was returned to the said W. J. Knight without the said W. J. Knight

ever having paid any consideration or any part of the amount to said Knight & Lovett or to anyone else.

That at the time of the passing of said act of sale and previous thereto the said W. J. Knight agreed with Knight & Lovett that he would take the title to said property, as well as a large quantity of movable property, and would hold the same for said Knight & Lovett. Said W. J. Knight further agreed at the time of and prior to said act of sale that he would convert said movable property into money and deliver the same to Knight & Lovett, and that whenever the said Knight & Lovett so desired, he would reconvey to them the land above described; that he would hold said land in trust for said Knight & Lovett and would act as their manager and agent in the matter of said property passed by said act of sale.

123

IV.

And your orators would further show unto the Court that in compliance with said agreement, the said W. J. Knight did convert said movable property into money and turned the same over to Knight & Lovett and that in further compliance with said agreement in regard to said real estate on the 5th day of Feb., 1887, conveyed to Viola P. Knight, the wife of Dan. R. Knight, one-half interest in said above described land, said one-half interest being the interest of Dan R. Knight, the said Dan R. Knight having requested the said W. J. Knight so to do and having authorized the same. That at said time W. J. Knight offered to reconvey to the said J. A. Lovett the one-half interest of said J. A. Lovett in said land, but that the said Lovett at said time desired to sell the same and did sell a one-fourth interest in the entire tract or a one-half of his one-half interest to John C. Knight and directed the said W. J. Knight to execute a deed for said part of said land to said J. C. Knight and in compliance with said request on the 7th day of Feb., 1887, the said W. J. Knight did execute an act of sale to said John C. Knight for a one-half interest in said land. That at the same time the said John A. Lovett sold his remaining one-fourth interest in said land to W. J. Knight, and the said W. J. Knight paid said Lovett at said time for said land, and that no conveyance was executed for the reason that the said W. J. Knight was the holder of the record title; that this was the first time said W. J. Knight ever acquired any real interest in said land, he holding same prior to that time as trustee and agent for said Knight & Lovett.

124

V.

That on the 8th day of March, 1889, Viola P. Knight, the wife of Dan R. Knight, executed a power of attorney in which she gave to said Dan R. Knight complete authority to sell all the lands in her name situated in Vernon Parish, Louisiana, which included one-half interest in the land above described, and that on the 13th day of April, 1889, the said Viola P. Knight, acting by and through her husband and attorneys in fact Dan R. Knight, and the said W. J. Knight and John C. Knight sold and conveyed all of said lands

above described to your orators, Henry J. Lutcher and G. Bedell Moore, and on the first day of April, 1901, the said G. Bedell Moore sold and conveyed, by a warranty deed, his interest in said lands to the Lutcher & Moore Lumber Co., and that the said lands are now owned in fee simple by said Henry J. Lutcher and the Lutcher & Moore Lumber Co.

VI.

That on the 13th day of April, 1889, the date of sale to
125 said Lutcher & Moore, they, the said Henry J. Lutcher and G. Bedell Moore went into possession of said lands and have ever since remained in possession thereof and have paid all taxes due thereon continuously since said date and that the defendants herein since said time have never paid or attempted to pay any taxes of any kind on said lands; that said lands are of the value of more than $10,000.

VII.

And your orators would further show to the court that the defendants, William H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight Durham and her husband, James Durham, on the 11th day of March, 1903, caused to be filed a suit in the District Court of Vernon Parish, Louisiana, twelfth district, against Henry J. Lutcher and the Lutcher & Moore Lumber Co., in which said suit said defendants above named claimed a one-half interest in said land and prayed for title thereto. That said above-named defendants in said suit claimed that they were the heirs of Mary Cain Knight, who was alleged to be the wife of W. J. Knight in 1882, on the date of the sale from Knight & Lovett to said William J. Knight; said above-named defendants claimed in said suit that their said mother died on Aug. 7, 1885, and that their father, William J. Knight, married again on the 18th day of June, 1886, and that therefore said acts of sale above set out from their father William
J. Knight and Viola P. Knight and John C. Knight to
126 Lutcher & Moore conveyed only a one-half interest in said land and they prayed that they be given judgment for the one-half interest of their mother, Mary Cain Knight.

That on March 26, 1903, the said Henry J. Lutcher and the Lutcher & Moore Lumber Company filed their petition for removal asking that said cause filed by said above named defendants in the District Court of Vernon Parish be removed to the United States Circuit Court in and for the Western District of Louisiana, and at the same time said Lutcher and Said Lutcher & Moore Lumber Company tendered a bond as required by the statute and on the same day an order of removal was duly made and said cause was removed to the Circuit Court of the United States in the Western District of Louisiana, and is now pending as cause No. 276 in said United States Circuit Court in and for the Western District of Louisiana at Shreveport on the law side of the docket, the transcript from the State Court having been filed in said court on April 15, 1903; that said Lutcher & Moore Lumber Company called in warranty your orator G. Bedell Moore.

VIII.

And your orators would further show unto the court that at the time they purchased said property in 1889 as above alleged the said W. J. Knight was married and your orators did not know that he had ever had a previous wife, and did not know of her death,
127 and that no administration had ever been taken out on her estate and that there was no public records of any kind or character in Vernon Parish, Louisiana, from which your orators could know or discover that the said W. J. Knight had had a previous wife or that she was dead, and said Henry J. Lutcher and G. Bedell Moore were innocent purchasers of said land without notice and they paid full value therefor.

XI.

Your orators further show that the community of acquets and gains existing between W. J. Knight and his alleged previous wife, Mary Cain Knight, never had any interest or title to said property or any part thereof; that W. J. Knight was simply and solely a trustee and agent of Dan R. Knight and J. A. Lovett; that the said W. J. Knight took said title with the distinct understanding and agreement that he would reconvey to said Knight & Lovett said land at any time they requested him to do so and that if any title vested in said W. J. Knight after the death of his alleged previous wife, Mary Cain Knight, executed said trust by conveying one-half interest in said land to the said Viola P. Knight and by further conveying one-fourth interest in said land to John C. Knight and also by paying the said John A. Lovett for the remaining one-fourth interest in said land, and that his said alleged previous wife had been dead about two years before the said W. J. Knight ever acquired any real title to any part of said land.

128 X.

Your orators would further show that the filing of said suit as herein before alleged, and the setting up of said claim to said land has clouded your orators' title to the same, and that said suit is at law and that your orators' defenses are equitable, and that the pendency of said suit and the cloud cast on your orators' title works irreparable injury and damage to your orators and that they have no adequate remedy at law.

Therefore, in order that your orators may obtain the relief to which they are justly entitled in the premises they pray—

First. That the Court grant a writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants commanding them and each of them, on a certain day and under a certain penalty, in the said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there full true and perfect answer make, but not upon oath or affirmation, the benefit whereof is expressly waived by your orators, to all and singular the premises, and further to stand, to perform and to abide such further orders, direction and decree therein

as to your Honors shall seem meet and shall be agreeable to equity and good conscience.

Second. That they be required to set forth any and every adverse interest, claim or demand in or to said land to the end that
129 the same may be justly adjudicated and declared null and void as against your orators, and that the title and ownership of your orators in and to said land be established and confirmed as against any and all claims of the defendants or either of them; that said deed from Knight & Lovett to W. J. Knight of the 28th of July, 1882, be declared to convey to said W. J. Knight no real title to said land, but that its effect be declared to consitute said W. J. Knight a trustee, and that all cloud on your orators' title to said lands forever be removed.

Third. That your Honors grant unto your orators your writ of injunction commanding the said defendants and each of them, their agents and attorneys, and all persons under their authority, direction or control to desist and refrain from the prosecution of said suit No. 276 pending at law in the United States Circuit Court in and for the Western District of Louisiana at Shreveport, styled William H. Knight *et al. vs.* Lutcher & Moore Lumber Company *et al.* or from taking any steps in said cause what ever and that upon final hearing said injunction be made perpetual.

Fourth. And that your orators may have such other and further relief, preliminary and final as the Court may seem meet and proper, and which equity may require, and for costs.

Second.

On February 16, 1904, defendants in error here filed
130 their exceptions and demurrers to said bill in said Court in words and figures as follows, to-wit:

No. —. In Equity.

LUTCHER & MOORE LUMBER CO. ET AL., Plaintiffs,
vs.
WILLIAM H. KNIGHT ET AL., Defendants.

Now comes the defendants in the above entitled cause, before answering, and demur to plaintiffs complaint for the following reasons, to-wit:

First. Plaintiffs are estopped from attacking their own title.

Second. The deed under which the defendants claim has been adjudged a good and valid title.

Third. The complaint comes too late, the defendants, having filed a suit in law, and the plaintiffs have answered to their demands, in which they set up a defense, which if sustained will be adequate in law.

Fourth. That the allegations of plaintiffs bill of complaint is simply a reiteration of their answer in suit No. 276 in the Circuit Court of the United States for the Western District of Louisiana, at law, and that the allegation therein contained and set forth set

up a plea of estoppel *in pias* and constitute a complete and adequate remedy at law.

Fifth. That the bill of complaint discloses no right or cause of action.

Finally—Defendants especially demur to the right of
131 plaintiffs to bring their bill in equity as neither the law nor the jurisprudence of this state, authorizes or provides suits in equity, and especially is this so as to real estate situated in the State. Hence, defendants *prove,* that the injunction herein asked for be denied. That this branch of the case be dismissed and plaintiffs cost and suit No. 276 be proceeded with according to law.

Third.

On February 16, 1904, an order was made by said Honorable Court in words and figures as follows, to-wit:

No. 286.

LUTCHER & MOORE LUMBER CO.
vs.
WM. J. KNIGHT ET AL.

This cause came on at this time to be heard upon the demurrer heretofore filed by the defendants. Whereupon, after argument of counsel for both plaintiff and defendants, the court sustained the demurrer and dismissed the suit at cost of complainant. Counsel for plaintiff excepts to the ruling of the court, and reserved a bill of exceptions.

Fourth.

In verification of the foregoing statements, certified copies of said documents under the hand and seal of the clerk of the United States Circuit Court for the Western District of Louisiana are filed with this motion and are prayed to be considered as a part hereof,
132 the same being copied verbatim in this motion for the convenience of the court.

Fifth.

Plaintiffs in error show to your Honors that they have been diligent in presenting their defense in this cause and by the petition herein set out, have asked leave of the Honorable Circuit Court to hear and determine such defenses in equity, which request was refused by said court as shown by its order entered herein.

Sixth.

Plaintiffs in error suggested to this Honorable Court that the ruling of the trial court on these questions is as to same *res judicata.* That said judgment is final and a contrary holding by this Honorable Court ought not to be made because of that fact, and plaintiffs in error further suggest to this Honorable Court that defendants in error have waived by the proceedings herein set out the jurisdiction

at law of the defense set up by plaintiffs in error and submitted themselves to such jurisdiction, and ought now in good conscience abide thereby.

Seventh.

Plaintiffs in error pray the court to consider this motion in connection with the petition for rehearing filed herein and if this Honorable Court should still be of opinion that the defenses urged by plaintiffs in error should be tried in equity, then they pray this Honorable Court to issue an order staying this suit and with-
133 holding your mandate until such trial in equity can be had and that your Honors certify to the trial court the questions to be tried in equity as presented by said defenses and instructing the trial court to proceed with the trial of same.

Respectfully submitted.

GEO. E. HOLLAND,
Attorney for Plaintiffs in Error.

I, George E. Holland, Attorney for Plaintiffs in Error, do hereby certify that in my judgment the foregoing motion is well taken and is good in law.

GEO. E. HOLLAND,
Attorney for Plaintiffs in Error.

134 And thereafter on January 1st, 1908, a certified copy of the original bill was filed in said cause in said Circuit Court of Appeals in words and figures following, to-wit:

Certified Copy Original Bill.

In the Circuit Court of the United States in and for the Western District of Louisiana, at Alexandria.

In Equity.

THE LUTCHER & MOORE LUMBER CO. ET AL., Plaintiffs,
vs.
WILLIAM H. KNIGHT ET AL., Defendants.

To the Hon. the Judges of the Circuit Court of the United States, for the Western District of Louisiana:

The Lutcher & Moore Lumber Co., Henry J. Lutcher and G. Bedell Moore bring this their bill against William H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight Durham and her husband, James Durham, William J. Knight and Dan R. Knight Sr., whereupon your orators complain and say.

I. That the Lutcher & Moore Lumber Co. is a corporation organized and existing under the laws of the State of Texas, domiciled and doing business at the town of Orange, — County, Texas; that Henry J. Lutcher and G. Bedell Moore are residents and citizens of the State of Texas and each and all of the defendants are residents and

citizens of the State of Louisiana, all of the defendants residing in Vernon Parish, Louisiana, except Dan R. Knight, who resides in Natchitoches Parish, Louisiana.

II. That heretofore, to-wit, on the 20th day of July, 1882, the defendant, Dan R. Knight and one John A. Lovett, who is now a resident and citizen of the State of Texas, by an act of sale of said date conveyed to William J. Knight, the following described lands situated in the Parish of Vernon and State of Louisiana, and being more particularly described as follows, to-wit: The S. W. ¼ of S. E. ¼ & S. E. ¼ of S. W. ¼, Sec. 5, T. 2, S., Range 11, west. The N. ½ of N. E. ¼ of Sec. 32, & S. E. ¼ & S. ½ of N. E. ¼, Sec. 33, T. 1, S., R. 11, W., & S. W. ¼ of N. E. ¼ & S. E. ¼ of N. W. ¼ and N. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼
135 & N. W. ¼ of S. E. ¼ & N. ½ of N. E. ¼, Sec. 5, T. 2, S., R. 11, W., and N. E. ¼ of N. E. ¼ Sec. 20, & N. W. ¼ of N. W. ¼ Sec. 21, T. 2, S. R. 11, W., and N. ½ of N. E. ¼ and N. E. ¼ of N. W. ¼, Sec. 21 & N. W. ¼ of N. W. ¼, Sec. 22, T. 2, S. R. 11, W., and fractional N. W. ¼ of fractional N. E. ¼ of Section (six) 6, T. 2, S. R. 11, W., and S. ½ of N. E. ¼, Sec. 6, T. 2, S. R. 11, W., and N. W. ¼ of N. E. ¼ of Sec. 34, T. 2, S. R. 11, W., and E. ½ of N. W. ¼, Sec. 20, T. 2, S. R. 11, W., and S. ½ of N. E. ¼ & S. E. ¼ of N. W. ¼ of Sec. 23, and S. W. ¼ of N. W. ¼ of Sec. 24, T. 2, S. R. 11, W., and N. E. ¼ of N. E. ¼ of Sec. 6, T. 2, S. R. 11, W., and W. ½ of S. W. ¼ of Sec. 17, N. E. ¼ of S. E. ¼, Sec. 18, T. 2, S. R. 11, W., and W. ½ and N. E. ¼ of S. E. ¼ & N. W. ¼ of S. E. ¼, Sec. 23, T. 2, S. R. 11, W., and 320 acres in Sec. 33, 28 & 29, T. 1, S. R. 11, W.

III. That at the time said act of sale was passed, the said Dan R. Knight, Sr., and John A. Lovett were partners in business, that said John A. Lovett and W. J. Knight were nephews of Dan R. Knight and that said property was conveyed to W. J. Knight without any consideration passing from said W. J. Knight to the said Knight & Lovett; that said act of sale recited a consideration of $500.00 cash and a note for $14500, which was payable on the first day of November, 1882, but that in truth and in fact the $500.00 cash which was paid in the presence of witnesses by W. J. Knight, to said Knight & Lovett was the money of Knight & Lovett which had previously been given to said W. J. Knight for the purpose of making said cash payment before witnesses; that the note of $14500 was executed and delivered to Knight & Lovett, but that the same was returned to the said W. J. Knight without the said W. J. Knight ever having paid any consideration of any part of the amount to said Knight & Lovett or to any one else.

That at the time of the passing of said act of sale and previous thereto, the said W. J. Knight agreed with Knight & Lovett that he would take the title to said property, as well as a large quantity of movable property, and would hold the same for said Knight & Lovett. Said W. J. Knight further agreed at the time of and prior to said act of sale that he would convert said movable property into money and deliver the same to Knight & Lovett, and that whenever the said Knight & Lovett so desired, he would reconvey to them the land

above described; that he would hold said land in trust
136 for said Knight & Lovett, and would act as their manager and agent in the matter of said property passed by said act of sale.

IV. And your orators would further show unto the Court that in compliance with said agreement the said W. J. Knight did convert said moveable property into money and turned the same over to Knight Lovett, and that in further compliance with said agreement in regard to said real estate on the 5th day of Feb., 1887, conveyed to Viola P. Knight, the wife of Dan R. Knight, one-half interest in said above described land, said one-half interest being the interest of Dan R. Knight, the said Dan R. Knight having requested the said W. J. Knight, so to do and having authorized the same. That at said time W. J. Knight offered to reconvey to the said J. A. Lovett the one-half interest of said J. A. Lovett in said land, but that the said Lovett at said time desired to sell the same and did sell a one-fourth interest in the entire tract or a one-half of his one-half interest to John C. Knight and directed the said W. J. Knight to execute a deed for said part of said land to said J. C. Knight and in compliance with said request on the 7th day of Feb., 1887, the said W. J. Knight did execute an act of sale to said John C. Knight for a one-half interest in said land. That at the same time the said John A. Lovett sold his remaining one-fourth interest in said land to W. J. Knight, and the said W. J. Knight paid said Lovett at said time for said land, and that no conveyance was executed for the reason that the said W. J. Knight was the holder of the record title; that this was the first time said W. J. Knight ever acquired any real interest in said land, he holding same prior to that time as trustee and agent for said Knight & Lovett.

V. That on the 8th day of March, 1889, Viola P. Knight, the wife of Dan R. Knight executed a power of attorney in which she gave to said Dan R. Knight complete authority to sell all the lands in her name situated in Vernon Parish, Louisiana, which included one-half interest in the land above described, and that on the 13th day of April, 1889, the said Viola P. Knight acting by and through her husband and attorney in fact Dan R. Knight, and the said W. J. Knight and John C. Knight, sold and conveyed all of said lands above described to your orators, Henry J. Lutcher and G. Bedell Moore, and on the first day of April, 1901, the said G. Bedell Moore sold and conveyed, by a waranty deed, his interest in said
137 lands to the Lutcher & Moore Lumber Co., and that the said lands are now owned in fee simple by said Henry J. Lutcher and the Lutcher & Moore Lumber Co.

VI. That on the 13th day of April, 1889, the date of sale to said Lutcher & Moore, they the said Henry J. Lutcher and G. Bedell Moore went into possession of said lands and have ever since remained in possession thereof and have paid all taxes due thereon continuously since said date, and that the defendants herein since said time have never paid or attempted to pay any taxes of any kind on said lands. That said lands are of the value of more than $10,000.

VII. And your orators would further show to the Court that the defendants, William H. Knight, John A. Knight, Miss Stella Knight, Mrs. Florence Knight Durham and her husband, James Durham, on the 11th day of March, 1903, caused to be filed a suit in the District Court of Vernon Parish, Louisiana, twelfth district, against Henry J. Lutcher and the Lutcher & Moore Lumber Co., in which said suit said defendants above named claimed a one-half interest in said land and prayed for title thereto. That said above named defendants in said suit claimed that they were the heirs of Mary Cain Knight, who was alleged to be the wife of W. J. Knight, in 1882, on the date of the sale from Knight & Lovett to said William J. Knight; said above named defendants claimed in said suit that their said mother died on Aug. 7, 1885, and that their father, William J. Knight, married again on the 18th day of June, 1886, and that therefore said acts of sale above set out from their father, William J. Knight and Viola P. Knight and John C. Knight to Lutcher & Moore conveyed only a one-half interest in said land, and they prayed that they be given judgment for the one-half interest of their mother, Mary Cain Knight.

That on March 26th, 1903, the said Henry J. Lutcher and the Lutcher & Moore Lumber Co., filed their petition for removal asking that said cause filed by said above named defendants in the District Court of Vernon Parish, be removed to the U. S. Circuit Court in and for the Western District of Louisiana, and at the same time said Lutcher and said Lutcher & Moore Lumber Co. tendered a bond as required by the statute and on the same day an order of removal was duly made and said cause was removed to the Circuit Court of the U. S., in the Western District of Louisiana, and is now pending as Cause No. 276, in said U. S. Circuit Court in and for the
138 Western District of Louisiana, at Shreveport, on the law side of the docket, the transcript from the State Court having been filed in said Court on April 15th, 1903; that said Lutcher & Moore Lumber Co. called in warranty your orator G. Bedell Moore.

VIII. And your orators would further show unto the Court that at the time they purchased said property in 1889, as above alleged the said W. J. Knight was married and your orators did not know that he had ever had a previous wife, and did not know of her death, and that no administration had ever been taken out on her estate and that there was no public records of any kind or character in Vernon Parish, Louisiana, from which your orators could know or discover that the said W. J. Knight had had a previous wife or that she was dead, and that said Henry J. Lutcher and G. Bedell Moore were innocent purchasers of said land without notice and they paid full value therefor.

IX. Your orators further show that the community of aquets and gains existing between W. J. Knight, and his alleged previous wife, Marcy Cain Knight, never had any interest in or title to said property or any part thereof; that W. J. Knight was simply and solely a trustee and agent of Dan. R. Knight and J. A. Lovett; that the said W. J. Knight took said title with the distinct understanding

and agreement that he would reconvey to said Knight & Lovett said land at any time they requested him to do so, and that, if any title vested in said W. J. Knight, it was charged with said trust, and that the said W. J. Knight after the death of his alleged previous wife Mary Cain Knight, executed said trust by conveying one-half interest in said land to the said Viola P. Knight, and by further conveying one-fourth interest in said land to John C. Knight and also by paying the said John A. Lovett for the remaining one-fourth interest in said land, and that his said alleged previous wife had been dead about two years before the said W. J. Knight ever acquired any real title to any part of said land.

X. Your orators would further show that the *tiling* [filing] of said suit as hereinbefore alleged, and the setting up of said claim to said land has clouded your orators' title to the same, and that said suit is at law, and that your orators' defenses are equitable, and that the pendency of said suit and the cloud cast on your orators'
139 title work irreparable injury and damage to your orators, and that they have no adequate remedy at law.

Therefore, in order that your orators may obtain the relief to which they are justly entitled in the premises they pray.

First. That the Court grant a writ of subpœna issuing out of and under the seal of this Honorable Court to be directed to the said defendants, commanding them and each of them on a certain day and under a certain penalty in the said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there full, true and perfect answer make, but not upon oath or *affamation* [affirmation], the benefit whereof is expressly waived by your orators, to all and singular the premises and further to stand to perform and to abide such further orders, direction and decree therein as to your Honors shall seem meet and shall be agreeable to equity and good conscience.

Second. That they be required to set forth any and every adverse interest, claim or demand in or to said land to the end that the same may be justly adjudicated and declared null and void as against your orators, and that the title and owership of your orators in and to said land be established and confirmed as against any and all claims of the defendants or either of them; that said deed from Knight & Lovett to W. J. Knight, of the 28th of July, 1882, be declared to convey to said W. J. Knight no real title to said land, but that its effect be declared to constitute said W. J. Knight, a trustee, and that all cloud on your orators' title to said lands forever be removed.

Third. That your Honors grant unto your orators your writ of injunction commanding the said defendants and each of them, their agents and attorneys, and all persons under their authority, direction or control to desist and refrain from the prosecution of said suit No. 276, pending at law in the U. S. Circuit Court, in and for the Western District of Louisiana, at Shreveport, styled William H. Knight, *et al., vs.* Lutcher & Moore Lumber Co. *et al.*, or from taking any steps in said cause whatever, and that upon final hearing said injunction be made perpetual.

Fourth. And that your orators may have such other and further

relief, preliminary and final as to the Court may seem
140 meet and proper, and which equity may require, and for costs.

HOLLAND & HOLLAND,
ALEXANDER & WILKINSON,
DAVIS & WILLIAMS,
Solicitors for Complainants.

THE STATE OF TEXAS,
County of Orange:

Before me the undersigned authority on this day personally appeared E. W. Brown, who being by me duly sworn on oath states that he is vice-president and agent of the Lutcher & Moore Lumber Co. and that he has read the allegations of fact in the foregoing bill and that they are true.

E. W. BROWN.

Sworn to and subscribed before me, this the 15th day of December, 1903.

J. A. HOLLAND,
Notary Public, Orange County, Texas.

In Equity.

THE LUTCHER & MOORE LUMBER COMPANY ET AL.
vs.
WILLIAM H. KNIGHT ET AL.

On reading and considering the foregoing bill and the affidavit thereto, it is ordered that the defendants be each cited and served according to law and that they and each of them show cause, if any they have at Alexandria, Louisiana, on the fourth Monday in January, 1904, why they and each of them should not be perpetually enjoined and prohibited from any further proceedings in said Cause No. 276, entitled Wm. H. Knight, *et al., vs.* Lutcher & Moore Lumber Company, *et al.*, and why the prayer of the bill should not be granted to complainants and the relief afforded them and so awarded in the manner and form as set forth in the foregoing bill of complaint.

Done and signed officially this the 21st day of December, 1903.

ALECK BOARMAN,
Judge, U. S. Circuit Court.

(Indorsed:) Lutcher & Moore Lumber Company, *et al., vs.* Wm. H. Knight, *et al.* No. 286. Original Bill. Filed Dec. 21st, 1903. E. C. Jackson, Dy. Clerk.

141 I, Walter Jackson, clerk of the United States Circuit Court, Fifth Circuit, Western District of Louisiana, do hereby certify that the above and foregoing eight (8) pages, contain a true, full and correct copy of the original bill and order thereon, in a

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cause entitled Lutcher & Moore Lumber Company, *et al., vs.* William H. Knight, *et al.,* No. 286, on the Equity Docket of said Court, as the original of same appears on file in my office.

Witness my hand and seal of office at the City of Shreveport, Louisiana, this 23rd day of December, A. D. 1907.

[SEAL.] W. JACKSON, *Clerk.*

The foregoing has the following indorsements, to-wit: No. 286. Lutcher & Moore Lumber Company, *et al., vs.* Wm. H. Knight, *et al.* Original Bill. Filed Dec. 21st, 1903. E. C. Jackson, Dy. Clerk. No. 1629. U. S. Circuit Court of Appeals. Filed Jan. 1, 1908. Charles H. Lednum, Clerk.

And thereafter on January 1st, 1908, there was filed in said cause in said Circuit Court of Appeals a certified copy of defendants' demurrer to complaint in words and figures following, to-wit:

Certified Copy Defendants' Demurrer to Complaint.

In the Circuit Court of the United States, in and for the Western District of Louisiana, at Shreveport.

No. —. In Equity.

LUTCHER & MOORE LUMBER CO. ET AL., Plaintiff,
vs.
WILLIAM H. KNIGHT ET AL., Defendants.

Now comes the defendants in the above entitled cause, before answering and demur to plaintiffs' complaint for the following reasons, to-wit:

First. Plaintiffs are estopped from attacking their own title.

Second. The deed under which the defendants claim has been adjudged a good and valid title.

Third. The complaint comes too late, the defendants
142 having filed a suit in law, and the plaintiff's have answered to their demands, in which they set up a defence, which, if sustained will — adequate in law.

Fourth. That the allegations of plaintiffs bill of complaint is simply a reiteration of their answer in suit No. 276, in the Circuit Court of the United States for the Western District of Louisiana, at law, and that the allegations therein contained and set forth set up a plea of estoppel *in pais,* and constitute a complete and adequate remedy at law.

Fifth. That the bill of complaint discloses no right or cause of action.

Finally Defendants especially demur to the right of plaintiffs to bring their bill in equity as neither the law nor the jurisprudence of this state, authorizes or provides suits in equity, and especially is this so as to real estate situated in the state. Hence Def'ts prove that the injunction herein asked for be denied. That this branch

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of the case be dismissed and plaintiffs cost and suit No. 276 be proceeded with according to law.

M. J. CUNNINGHAM, JR.,
MURFF & WEBB, *Att'y-*.

Indorsed: No. 286. Lutcher & Moore Lumber Company, *et al.*, *vs.* Wm. H. Knight *et al.* Demurrer. Filed Feb. 16/04. W. Jackson, Clerk.

I, Walter Jackson, clerk of the United States Circuit Court, Fifth Circuit, Western District of Louisiana, do hereby certify that the above and foregoing page contain- a true, full and correct copy of the demurrer in a cause entitled Lutcher & Moore Lumber Company, *et al.*, *vs.* William H. Knight *et al.*, as the original of same appears on file in my office.

Witness my hand and seal of office at the city of Shreveport, Louisiana, this 24th day of December, A. D. 1907.

[SEAL.] W. JACKSON, *Clerk*.

The foregoing has the following indorsements, to-wit: No. 1629. U. S. Circuit Court of Appeals. Filed Jan. 1, 1908. Charles H. Lednum, Clerk.

143 And on January 1st, 1908, a certified copy of order on defendants' demurrer to complaint was filed in said cause in said Circuit Court of Appeals in words and figures following, to-wit:

Certified Copy Order on Defendants' Demurrer to Complaint.

Extract from Minutes of Court.

SHREVEPORT, LOUISIANA,
TUESDAY, *February 16th*, A. D. 1904.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, Judge; M. C. Elstner, U. S. Attorney; B. F. Oneal, U. S. Marshal; W. Jackson, Clerk.

No. 286.

LUTCHER & MOORE LUMBER CO.
vs.
WM. J. KNIGHT ET AL.

This cause come- on at this time to be heard upon the demurrer heretofore filed by the defendants. Whereupon, after argument of counsel for both plaintiff and defendants, the Court sustained the demurrer and dismissed the suit at cost of complainant. Counsel for plaintiff excepts to the ruling of the Court, and reserves a bill of exceptions.

I, Walter Jackson, clerk of the United States Circuit Court, Fifth Circuit, Western District of Louisiana, do hereby certify that the above and foregoing is a true and correct extract from the Minute Book of the United States Circuit Court, Fifth Circuit, Western District of Louisiana, for the Shreveport Division.

Witness my hand and seal of office at the City of Shreveport, Louisiana, this 24th day of December, A. D. 1907.

[SEAL.] W. JACKSON, *Clerk.*

The foregoing has the following indorsements, to-wit: No. 1629. U. S. Circuit Court of Appeals. Filed Jan. 1, 1908. Charles H. Lednum, Clerk.

144 On January 1st, 1908, a certified copy of agreement and motion to transfer cause was filed in said cause in said Circuit Court of Appeals in words and figures following, to-wit:

Certified Copy Agreement and Motion to Transfer Cause.

In the Circuit Court of the United States in and for the Western District of Louisiana, at Alexandria.

In Equity.

THE LUTCHER & MOORE LUMBER CO. ET AL., Plaintiffs,
vs.
WILLIAM H. KNIGHT ET AL., Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Western District of Louisiana.

Now comes the parties, plaintiffs and defendants in the above styled cause by counsel, and moves and prays that said cause be continued until the fourth Monday in February, and that same be heard before your Honors at that time in session at the City of Shreveport, Louisiana.

ALEXANDER & WILKINSON,
Att'ys for Pl'ffs.
MURFF & WEBB, *Att'ys for Def'ts.*

Indorsed: No. 286. In Equity. The Lutcher & Moore L'b'r Co., *et al., vs.* William H. Knight, *et al.* Agreement & Motion to transfer. Filed Jan. 28th, 1904. W. Jackson, Clerk.

I, Walter Jackson, Clerk of the United States Circuit Court, Fifth Circuit, Western District of Louisiana, do hereby certify that the above and foregoing is a true, full and correct copy of the agreement & motion to transfer, in a cause entitled The Lutcher & Moore Lumber Co., *et al., vs.* William H. Knight, *et al.,* No. 286, on the docket of said Court, as the original of same appears on file in my office.

Witness my hand and seal of office at the City of Shreveport, Louisiana, this 24th day of December, A. D. 1907.

[SEAL.] W. JACKSON, *Clerk.*

The foregoing has the following indorsements, to-wit: No. 1629. U. S. Circuit Court of Appeals. Filed Jan. 1, 1908. Charles H. Lednum, Clerk.

145 And on January 1st, 1908, a certified copy of judgment was filed in said cause in said Circuit Court of Appeals in words and figures following, to-wit:

Certified Copy Judgment.

In the United States Circuit Court in and for the Western District of Louisiana, City of Shreveport.

No. 276.

WM. H. KNIGHT ET ALS.
vs.
H. J. LUTCHER ET ALS.

In the above cause by virtue of the verdict of the jury finding in favor of the plaintiffs in the above cause, the law and evidence being in favor thereof, it is ordered, adjudged and decreed that the plaintiffs, Wm. H. Knight, John Knight, Miss Stella Knight and Mrs. Florence Knight, wife of James Durham, do have and recover judgment against the defendants, H. J. Lutcher and the Lutcher & Moore Lumber Company, decreeing the plaintiff- to be the owners of an undivided one-half interest in and to the following described lands set forth in the plaintiffs' petition in this cause as follows, to-wit:

South half of Section Thirty-three (33), in Township One (1), South of Range Eleven (11), West; Southeast quarter of northwest quarter, southwest quarter of northwest quarter, west half of southeast quarter and east half of southwest quarter of Section Five (5); west half of southwest quarter of [Section] Seventeen (17); northeast quarter of southeast quarter of Section Eighteen (18), east half of northwest quarter and northeast quarter of northeast quarter of Section Twenty (20), north half of north half of Section Twenty-one (21), northwest quarter of northwest quarter of Section Twenty-two (22) south half of the northeast quarter, southeast quarter of northwest quarter, west half of southwest quarter, northeast quarter of northwest quarter and the northwest quarter of southeast quarter of Section Twenty-three (23), southwest quarter of northwest quarter of Section Twenty-four (24), and the northwest quarter of the northeast quarter of Section Thirty-four (34), all in Township Two (2), south of Range Eleven (11), West; in the Parish of Vernon, State of Louisiana, and as such that they be put in possession of the same.

It is further ordered, adjudged and decreed that the defendants pay all cost of the suit.

146 Thus done read and signed on this 3rd of November, 1906.

ALECK BOARMAN, *Judge.*

Indorsed: No. 276. Wm. H. Knight, *et als., vs.* H. J. Lutcher, *et als.* Judgment. Filed Nov. 3rd, 1906. E. C. Jackson, D'y Clerk.

I, Walter Jackson, clerk of the United States Circuit Court, Fifth Circuit, Western District of Louisiana, do hereby certify that the above and foregoing two pages contain a true, full and correct copy of the original judgment in the suit, William H. Knight, *et als., vs.* H. J. Lutcher, *et als.*, No. 276, on the docket of said Court, as the same appears on file and of record in my office.

Witness my hand and seal of office, at the City of Shreveport, Louisiana, this 15th day of March, A. D. 1907.

[SEAL.] W. JACKSON, *Clerk.*

The foregoing has the following indorsements, to-wit: No. 1629. U. S. Circuit Court of Appeals. Filed Jan. 1, 1908. Charles H. Lednum, Clerk.

And on January 22, 1908, an order staying mandate was made in said cause in words and figures following, to-wit:

Order Staying Mandate.

JANUARY 22, 1908.

No. 1629.

LUTCHER & MOORE LUMBER COMPANY
vs.
WILLIAM H. KNIGHT ET AL.

Ordered, That the issuance of mandate in this cause be, and it is hereby, stayed for thirty days from this date.

147 I, Charles H. Lednum clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the 45 pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the Court (except the transcript of the record from the Circuit Court of the United States, for the Western District of Louisiana, in a certain cause in said Court, numbered 1629, wherein Lutcher & Moore Lumber Company, is plaintiff in error, and William H. Knight *et al.*, are defendants in error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the

City of New Orleans, Louisiana, in the Fifth Circuit, this 23rd day of January, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

148 In the Supreme Court of the United States.

#665.

LUTCHER & MOORE LUMBER CO. ET AL., Petitioners,
versus
WILLIAM H. KNIGHT ET AL., Respondents.

It is agreed between the undersigned counsel for Petitioners and Respondents, respectively, that the certified transcript of the record in the above entitled and numbered cause, now on file in the office of the Clerk of the Supreme Court of the United States, shall be accepted as a return to the writ of certiorari granted herein on April 6th, 1908.

Washington, D. C., April 10, 1908.

A. P. PUJO,
PUJO, MOSS & SUGAR, AND
GEO. E. HOLLAND,
Counsel for Petitioners.
M. J. CUNNINGHAM, JR., AND
A. J. MURFF,
Counsel for Respondents.

Leesville, Louisiana, April 20, 1908.

Endorsed: No. 1629. Filed 22 day of April, 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

A True Copy: Attest with seal this 22nd day of April, 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

149 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Lutcher & Moore Lumber Company is plaintiff in error and William H. Knight *et al.* are defendants in error, which suit was

removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the
150 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of April, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

151 [Endorsed:] 665, 21068. Apr. 24, '08. File. No. 21,068. Supreme Court of the United States. No. 665, October Term, 1907. Lutcher & Moore Lumber Co. *et al. vs.* William H. Knight *et al.* Writ of Certiorari. Filed 22 day of April, 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of said court, do hereby certify that I received the within writ on the 22nd day of April, A. D. 1908, and inasmuch as the attorneys for the parties therein named have, by stipulation in writing this day filed in my office, agreed that the certified transcript of the record in the case named in this writ, now on file in the office of the Clerk of the Supreme Court of the United States, shall be accepted as a return to the writ of certiorari granted therein on April 6, 1908, Therefore, in compliance with said writ, and by direction of the Judges of this court, I have made and attach hereto a certified copy of said stipulation as a return to the within writ.

Witness my official signature and the seal of said court this the 22nd day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals,
Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

152 [Endorsed:] File No. 21,068. Supreme Court U. S., October Term, 1909. Term No. 101. Lutcher & Moore Lumber Co. *et al. vs.* William H. Knight *et al.* Writ of certiorari & return. Filed April 24th, 1908.

No. [illegible]

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IN THE

Supreme Court of the United States

LUTCHER & MOORE LUMBER CO.

PETITIONERS

Versus

WILLIAM H. KNIGHT ET AL.

RESPONDENTS

PETITIONER'S BRIEF

—BY—

GEO. E. HOLLAND,
A. P. PUJO
Attorneys for Petitioners.

The Leader Printing Co., Orange, Texas

DARK PAGE

IN THE

Supreme Court of the United States

LUTCHER & MOORE LUMBER CO.

PETITIONERS

Versus

WILLIAM H. KNIGHT ET AL.

RESPONDENTS

PETITIONER'S BRIEF

STATEMENT OF CASE.

Respondents here on March 11, 1903, filed this suit in the District Court of Vernon Parish, Louisiana, and upon proper bond and petition, it was moved by Petitioners to the Circuit Court of the United States for the Western District of Lousiana.

By their petition Respondents sought to recover from

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Petitioners several tracts of land in Vernon Parish, Louisiana, of the proven value of over Five Thousand Dollars. Their claim was substantially that these lands were acquired by their father in his name during the marriage relationship between their father and mother and were the community assets of that co-partnership. That after the death of the mother, the father holding title in his name, conveyed to Petitioners, title to all of said lands. That because of the death of the mother, they, as her heirs, were entitled in indivision to a one-half interest in said properties for which they pray recovery. (Tr. 2).

The cause was docketed on the law docket of the Circuit Court and Petitioners here filed their bill in in equity in said Court containing all of their defenses filed in this suit and prayed that same be heard in equity and that the proceedings at law be stayed for that purpose. (Tr. 134). Upon demurrer to this complaint on the ground that the several defenses were triable at law and in this suit; (Tr. 141), the trial Court dismissed Plaintiffs bill in equity (Tr. 143) and heard all of the case together, rendering judgment in favor of Petitioners here. Respondents appealed from this judgment and the Circuit Court of Appeals of the Fifth Circuit reversed the cause because of some defect in the petition for removal.

In the trial Court after the reversal; the petition for removal was corrected and a trial **de novo** of the cause had, at which the trial Court refused Petitioners here the

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right to introduce any evidence on their defenses set up and refused to submit such defenses to the jury and under instructions from the Court, a verdict was returned against Petitioners and in favor of Respondents for the land sued for and judgment of the Court rendered accordingly. (Tr. 72).

Petitioners defenses consisted of:

1st. A denial of the marriage between Plaintiff's father and mother.

2nd. A denial that the property sued for ever was a portion of the community of acquets and gains of Plaintiff's father and mother, and as a reason why same was not a part of such community property, Petitioners alleged (1) That the sale to the Plaintiff's father was a simulated transaction made by the grantors in the deed to him for the purpose of covering said property from their creditors, thus placing it beyond their reach, but giving the father of Plaintiffs no beneficial interest in same, and that he never held a beneficial interest in same. (2) That no consideration was paid by Plaintiff's father for said property, but that same was a gift to him by the grantors in the deed to him. (3) That the title held by Plaintiff's father was one in trust for the grantors in the deed to him, intended to give him the widest powers of agency over the property, but that he never held any beneficial interest in the property. (4) That the consideration recited in the deed to Plaintiff's father was never paid nor was any consideration ever

paid by him for the property. Petitioners further plead innocent purchase of the property for value in good faith and claimed their right to hold the same as such innocent purchasers, and plead the ten year statute of prescription. (Tr. 8-13).

Respondents case consisted of the deed to their father conveying the property in legal form reciting the consideration to be Five Hundred Dollars cash and Fourteen Thousand Five Hundred Dollars evidenced by note described in the deed, proof of the subsequent death of the mother prior to the sale of the land by the father and their heirship. The trial court refused to admit any evidence offered by Petitioners, except the value of the land, their purchase without notice, the payment of value and the continuous payment of taxes by them since their purchase. The cause was appealed by Petitioners to the Circuit Court of Appeals of the Fifth Circuit upon the following assignment of errors:

I. The Court erred in the rejection of evidence offered by the Defendants in the following instances, to-wit:

(a) In rejecting the evidence of Dr. J. A. Lovett, who in effect testified that the land in controversy formerly belong to a partnership known as "Knight & Lovett," of which the witness was a junior member, who in order to confer on W. J. Knight, father of the Plaintiff, the fullest powers of agency, purported to transfer to him the land in controversy for a stated consideration of Fifteen

Thousand Dollars, Five Hundred Dollars of which purported to have been paid in cash and the balance in one note of Fourteen Thousand Five Hundred Dollars, due at one month. But that the Five Hundred Dollars purporting to have been paid in cash was the money of Knight & Lovett, and the Fourteen Thousand Five Hundred Dollar note was never paid by W. J. Knight in any way until long after the death of his wife, and that then it was paid in carrying out this agreement made before and at the time of the sale to W. J. Knight on July 28, 1882, whereby W. J. Knight agreed to hold the property in question as trustee and agent of Knight & Lovett. That all of the sales made of the property in controversy by W. J. Knight, the father of the Plaintiff, after the death of his wife and their mother, the proceeds of such sales were delivered to Knight & Lovett, the former vendors, in pursuance of said agreement, as will fully appear by the testimony of said Dr. Lovett attached to and forming part of Defendants bill of exception No. 1.

II. In rejecting that portion of the evidence of Dr. J. A. Lovett, a witness for the Defendants, which was offered to show and which did show that the credit portion of the purchase price of W. J. Knight from Knight & Lovett, of date, July 28, 1882, was paid in and about 1889, out of the sales made by W. J. Knight of the land in controversy, and that the proceeds of such sale so made by W. J. Knight were used to pay the credit portion of such purchase price as will fully appear by the testimony of said J. A. Lovett, annexed and forming a part

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of Defendants bill of exception No. 1, and as fully set forth in Defendants bill of Exception No. 3.
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(a) In excluding the testimony of the witnesses, T. J. Word and A. W. McCranie, offered on behalf of the Defendants to show that the credit portion of the purchase price of the sale from Knight & Lovett to W. J. Knight of date July 28, 1882, to the land in controversy was paid after the death of the wife of W. J. Knight, the mother of the Plaintiffs by the sale of the land in controversy, and the proceeds of the said sale of land in question was used to pay the credit portion of the purchase price mentioned in said sale, which was secured by a vendor's privilege on said land, and that the identical proceeds of the sale of said land in controversy was used only for that purpose, as all of which is fully set forth in Defendants' bill of exception No. 3.

III. The Court erred in refusing to permit the Defendants to file their third amended answer, which is attached to and made a part of Defendants' bill of exception No. 2.

IV. The Court erred in making the charge to the jury in refusing to state propositions requested by the Defendants in the following instances:

(a) In refusing to charge the jury as follows: There being evidence before the Court tending to support the charge thus requested and the same having not been covered by the Court's general charge:

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"The Defendants in this case have filed a plea of ten years prescription, urging that they have held the property in question under a just title and in good faith for more than ten years before said suit was brought. I charge you that the title under which they hold may be denominated a just title, valid on its face, and if you find that they have held such a title for more than ten years, in good faith, believing that they were the owners of the property, then I charge you that the plea of prescription ought to be sustained, unless the evidence has shown some fact that would prevent the running of prescription against the Plaintiffs."

(b) The Court erred in refusing to charge the jury in behalf of the Defendants, as follows:

"In this case, the Plaintiffs claim as heirs of their mother, one-half interest in the property in question on the ground that it was bought during the lifetime of their mother, during the existence of the community of acquets and gains between her and their father, W. H. Knight, and was sold by the father after the death of their mother. I charge you that in order for them to recover that it is necessary for them to show that the community between their father and mother had been settled and liquidated by the payment of its debts, and until they do so, they cannot recover any interest in any specific piece of property." Which said special charge is fully set forth in Defendants bill of exception No. 5.

V. The court erred in overruling the motion of De-

fendants for a new trial, as set forther (forth) in Defendants bill of Exception No. 6.

VI. The Court erred in entering judgment in favor of the Plaintiffs and against the Defendants.

The Circuit Court of Appeals of the Fifth Circuit affirmed the cause in the following opinion:

"After a thorough and attentive consideration of the questions raised on this writ, we are of the opinion that the matters of defense relied upon by Plaintiffs in Error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a Court of law, we therefore affirm the judgment of the District Court." (Tr. 103).

Petitioners show to this Honorable Court that error has been committed in the following matters, to-wit:

I.

The Circuit Court of Appeals erred in holding the defenses of the Plaintiffs in Error not cognizable in a Court of law after a final decision to the contrary by a Federal Court in the same cause between same parties.

II.

The Circuit Court and Circuit Court of Appeals erred in holding the cause of action of Defendants in Error cognizable in a Court of law.

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III.

The Circuit Court of Appeals erred in holding the defenses of the Plaintiffs in Error cognizable only in equity, whereas same were but denials of Plaintiffs action and the presumptions of fact arising thereon.

IV.

Error was comitted in not directing a verdict for Defendants under Plaintiffs proof.

V.

Error was committed in not allowing evidence that the lands sued for were held in trust and without a beneficial interest.

VI.

Error was committed in not holding Plaintiffs in Error entitled to protection in their title as innocent purchasers for value.

Taking the specification of errors consecutively, we desire to call the Court's attention to the attitude Petitioners have been placed in because of the Circuit Court of Appeals at its own initiative refusing to consider Petitioners defenses at law.

If the phrase **"Nihil in lege intolarabilius est, eandam rem diverso jure censeri"** has any meaning or force, or can have any application, it is presented by this cause. In a suit between the same parties the Circuit Court of

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the United States for the Western District of Louisiana held by final decree rendered, that the defenses urged by Petitioners in this cause were properly triable at law and in this cause. This holding was had and was the result of the contention of Respondents in this cause. The cause was tried in said Court in obedience to its decision thus announced. After this decision had reached the age limit from which no writ of error from it would lie, and on second appeal of this cause, without contention by either party, the Honorable Circuit Court of Appeals announces a different decision and thereby cuts off from Petitioners any remedy for the rights they are admitted by all parties and all Courts to have.

We contend that the determination of the Circuit Court that Petitioners' defenses were not in equity amounted to an adjudication that they had the right to urge the same in this action, in a court at law, and that as to such defenses; their right to here urge same is **stare decisis.** (Berry vs. Ginaca—5—Fed. Rep.—475). To say the least of it, the defenses urged are concurrent at law and in equity and Respondents having by their act obtained a judicial determination of the question, that they are properly triable at law, have waived any contention to the contrary.

Petitioners are in the attitude of having a cause with merit, but without a tribunal in which to urge it, the Federal Court having locked its door by final decree against their defenses presented in equity and a Federal

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Court having locked its door against their defenses presented at law; and yet both parties admitting that such defenses are just and a complete answer to Plaintiffs case.

Petitioners present here the contention that the cause of action set up by the Respondents is one in equity and not at law and over which jurisdiction ought not to have been entertained by either the Circuit Court or Circuit Court of Appeals.

Respondents action is nothing more nor less than a suit to remove cloud from their secret equitable title. The petition presents the fact that Petitioners are not the holders of the legal title, and their claim is through the mother because of her secret one-half interest in the community. This class of title declared on by the Respondents is purely an equitable title. (Wooters vs. Feeny—12—La. Ann.—449; Patty vs. Middleton—82—Texas—586).

Petitioners contend that the defenses urged by them were but denials of Plaintiffs action.

Before Petitioners should be relegated to a Court of equity and ousted from a Court of law, they should set up something showing a necessity for affirmative relief. Their defenses here, taken in connection with the Plaintiffs suit, show they are not in need of affirmative relief,

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but their defenses are simply to the effect that Respondents are not entitled to the affirmative relief they seek.

Before Plaintiffs could recover, they must show that the property sued for is a part of the community. Certainly Defendants could answer this by showing the same to be untrue and by showing any state of facts that would make it untrue, and they certainly ought to be permitted to show this in any Court, in defense of Plaintiffs action. We do not belive it to be the law that Defendants would have to go into a Court of equity to establish the negative of any proposition. In other words we believe that whereever Plaintiffs action is maintainable, a defense negativing this action would be heard. This is the contention of Petitioners here and if correct, the Circuit Court of Appeals erred in not reversing this cause and directing that Petitioners in said trial Court have the benefit of their defenses.

Petitioners contend that under the undisputed proof offered by Plaintiffs in the trial Court a verdict in their favor should have been directed and supporting this contention by the record, we submit: Plaintiffs offered in evidence a deed placing the legal title in their father conveying to him the property in controversy. This deed showed the consideration to be Five Hundred Dollars cash and Fourteen Thousand Five Hundred Dollars evidenced by note. (Tr. 38). They proved the marriage of their father and mother prior to this deed, the death of

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the mother after the date of same and their heirship and rested. We do not dispute the presumption that arises from a purchase made during the marital relation, that the property belongs to the community, but this presumption is one of fact and can be overcome by proof to the contrary. (Bartells vs. Shouchon—48—La. Ann.—783; Weymouth vs. Hawtells—34—Pac. Rep.—109).

Petitioners contention, plainly stated, is that the presumption only extends to the property shown by the instrument to have been acquired or whatever interest therein the conveyance shows was acquired, during the marriage relation and in the case at bar, the proof introduced, only showed that the community had an undivided one-thirtieth interest in the land sued for, or an interest of Five Hundred Dollars, of a total of Fifteen Thousand Dollars, consideration. The presumption cannot be extended further than this and as no proof was offered that the community paid the outstanding note or that the same was ever paid, the record shows no evidence from any standpoint, of Plaintiffs right to any portion of the land, but simply, if anything, an equity to the extent of one-thirtieth interest therein.

If this contention is correct and we are willing to submit it as being absolutely correct, then there is no theory upon which the Plaintiffs could be entitled to recover in the suit filed.

Petitioners contend that evidence should have been

admitted as offered by them to show that the lands sued for were held in trust and without beneficial interest by Plaintiffs father.

Testimony of J. A. Lovett was offered as follows:

"The understanding was that W. J. Knight would hold the property for us and that on the surrender of his note and Five Hundred Dollars, he was to deed the property back to us. We made this sale for the purpose of protecting ourselves against our debts. To the best of my recollection, the money belonged to Knight & Lovett, but I cannot be positive about that now. I am not positive that it was as much as Five Hundred Dollars, but I know there was some paid. I do not remember definitely the amount. It was for the purpose of closing that deal. It was returned to him when he transferred a lot of the property back to the parties. In the meantime D. R. Knight and I had dissolved partnership, and also D. R. Knight's wife had sued him for a partition of their property. W. J. Knight transferred to D. R. Knight's wife the interest of D. R. Knight in the land. The proceeds of the sale of the personal property were paid to D. R. Knight and myself." (Tr. 81; see testimony of J. A. Lovett in full).

Petitioners contention here is passed on and fully explained in the case of Crenshaw vs. Harris—41—S. W.—392, and if that case is good law, then the testimony here offered was admissible for the purpose offered and should

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have been allowed by the trial Court, and error has been committed by both Courts in rejecting it.

Petitioners further contend that the evidence showed them to be innocent purchasers of the property for value and entitled to protection as such.

It is not a disputed fact that Petitioners here are entitled to hold this property as purchasers in good faith if the law permits it. The case of Hensley vs. Lewis—82 —Texas—595; Mangum vs. White—41—S. W. Rep.—80 Crary vs. Field—61—Pac. Rep.—118; all announce the contention of the Petitioners upon this phase of the case as being sound and we know of no law to the contrary, and we submit the contention upon those cases as well as numerous others that might be cited.

ARGUMENT.

This cause stands in this attitude. Respondents have recovered a judgment against Petitioners for an undivided one-half interest in large and valuable tracts of land to which Petitioners have a perfect legal record title, which they bought in good faith and paid value for; without any notice of Respondents rights, and which, for more than ten years they openly asserted title to and paid taxes on. Respondents in a Court of law have recovered these lands on the strength of a secret title, an equitable title, a title coming to them from their mother, because of a presumption of fact that this property was a part of the

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community assets of herself and husband. This recovery was had solely on the presumption of fact arising because the deed was executed to the father during the life of the mother and the presumption was extended by the trial Court and Circuit Court of Appeals beyond the deed and beyond the evidence and without testimony to embrace a full undivided one-half interest in the property as against the recitals in the deed to the father that only one-thirtieth interest had ever passed to the community. This judgment was also rendered without permitting Petitioners to offer evidence which would have shown that all interest shown to be in the community was in fact nothing but a naked trust, and that no beneficial interest in the property ever vested in the community. That the consideration paid by them for the property actually went to pay and take up the outstanding obligation shown in the deed to the father, and this upon a theory that these defenses could not be urged in this suit at law and must first be established in equity, this latter holding being one of the Circuit Court of Appeals, contrary to the holding of the Circuit Court in the same cause, in an action brought by these Petitioners against Respondents. We submit that all property rights are too sacred to thus be taken from the owner without an opportunity of being heard in any Court. Some Court is certainly open to them to determine their rights, and as this is the last Court that can guarantee them these rights, we submit that the Writ of Certiorari herein prayed for should be granted and that judgment of both the Circuit Court of

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Appeals and Circuit Court be reversed with such instructions as will afford these Petitioners safety in their property rights and the right to have their defenses determined in some tribunal that this Court will open to them for that purpose.

Respectfully submitted,

GEO. E. HOLLAND,

A. P. PUJO,

Attorneys for Petitioners.

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IN THE

Supreme Court of the United States.

LUTCHER & MOORE LUMBER CO. ET AL.,
PETITIONERS,

vs.

WILLIAM H. KNIGHT ET AL., RESPONDENTS.

Supplemental Brief in Behalf of Petitioners.

May it please the Court:

Respondents' father and mother, William J. Knight and Mary Cain, were *married July 29, 1875.*

The land, the subject-matter of this controversy, was transferred by Knight & Lovett, a commercial firm, composed of Daniel R. Knight and Dr. J. A. Lovett, to W. J. Knight, *July 28, 1882* (Tr., p. 38).

Mary Cain-Knight, wife of W. J. Knight, and mother of the respondents, *died August 7, 1885.*

On February 5, 1887, W. J. Knight transferred an undivided one-half interest in the land to Mrs. Viola P. Knight, the wife of Dan R. Knight, a member of the former firm of Knight & Lovett (Tr., p. 42).

On February 7, 1887, W. J. Knight transferred an undivided one-fourth interest in this land to J. C. Knight, a relative (Tr., p. 41).

On April 13, 1889, Mrs. Viola P. Knight, J. C. Knight, and W. J. Knight, sold the same to the petitioners herein.

Were it not, that in the original brief, the position has been taken that the community interest extended only

in the proportion that the money paid during its existence, bore to the entire purchase price, this supplemental brief would not be presented.

The jurisprudence of Louisiana is uniform that as a general rule all property purchased by the husband during marriage belongs to the community, even if paid for after its dissolution.

Morris *vs.* Covington, 2 Ann., p. 259.

So, where property is purchased during the community and after its dissolution, the title is perfected by the survivor paying the purchase price, the property belongs to the community and the price so paid after dissolution is a community debt.

Mariotte *vs.* Lieux, 41 Ann., p. 817.

In fact, this position was originally recognized by petitioners, as in their amended and supplemental answer (Tr., p. 85), it was urged alternately, that, if the property did constitute an asset of the community, it was liable for the community debts. This answer was not allowed by the court.

In considering a similar question, the Supreme Court of Louisiana, in Tuggle *vs.* Tugwell, 32 Ann., p. 852, said:

> "To set at rest this vexed question we distinctly announce that construing the articles of the Code on this subject in accordance with what we believe to be their plain and express language, we hold that, when the community of acquests and gains is dissolved by the death of the wife, the respective interests of the husband and deceased wife attach at the moment of the dissolution to the property of the community, subject to the payment of the community debts.

Article 2403 of the Revised Civil Code of Louisiana specifically announces that—

> "the debts contracted during the marriage enter into the partnership of community of gains, and

> must be acquitted out of the common fund whilst the debts of both husband and wife anterior to the marriage must be aquitted out of their own personal and individual effects."

In this case the anomalous condition is presented of heirs accepting the succession of their deceased mother, by filing a suit claiming under their heirship, being recognized by judgment of a court of law, as the owners of the property inherited from their mother, and yet denying petitioners the right to have enforced against the heirs the debts due by the community formerly existing between their mother and father. To go a step further: The heirs have unconditionally accepted the succession of their mother by proceeding judicially claiming ownership of the property involved in this suit through inheritance from her.

This acceptance relates back to the opening of the succession, and the effect of their acceptance is to make them responsible for the entire debts of the succession, unless before acting as heir they caused a true and faithful inventory to be made (see arts. 987–988 and 1013, Revised Civil Code of Louisiana).

The transfer from Knight & Lovett to W. J. Knight (page 38 of Tr.) shows that the ostensible consideration was $14.500, of which sum $500 was alleged to have been paid in cash and the residue was represented by a note for an equal amount, payable on the 1st day of November, 1882.

The evidence of Dr. J. A. Lovett, one of the members of the then firm of Knight & Lovett, offered by petitioners and excluded by the trial court, appearing at page 81 of the transcript herein, shows that no accounting was made by W. J. Knight, the ostensible owner of the land, nor payment of the note during the existence of the community, which was terminated by the death of Mrs. W. J. Knight on August 7, 1885.

While we recognize the doctrine that parol evidence is not admissible for the purpose of establishing title to real estate, yet testimony of such character is admissible to show that the note representing the credit portion of the purchase price had not been canceled nor retired at the time of the death of Mrs. Knight.

The main contention of the petitioners in this case is that the property never belonged to W. J. Knight, but that he was merely a trustee for the use and benefit of Knight & Lovett, who had transferred the property to him in order to avoid the pursuit of their creditors.

There is authority for the statement that a trust may be established by parole. It has been held by your honorable court, in Smithsonian Institution *vs.* Meech, 169 U. S., page 405, that the evidence of a single witness, if corroborated by circumstances, is sufficient to establish an oral trust concerning real estate bought by the husband in the wife's name.

Such being the case, the transfers by Knight & Lovett to W. J. Knight; by the latter to Mrs. Viola P. Knight, wife of Dan R. Knight, one of W. J. Knight's original transferors; by W. J. Knight to J. C. Knight, a relative; and finally by Mrs. Viola P. Knight, J. C. Knight and W. J. Knight, the ostensible record owners of an undivided one-half and an undivided one-fourth each, respectively, to petitioners, are strongly corroborative of the testimony of Dr. J. A. Lovett, one of the original transferring partners, that no real title ever passed to W. J. Knight, nor that he ever acquired any interest therein, even to the extent of an undivided one-fourth of the property until 1887, two years after the death of his wife. This testimony, had it been admitted, would have been sufficient to establish the trust relations which W. J. Knight occupied to Knight & Lovett, the real owners of the property.

The exclusion of the testimony was error and parol

should have been admitted to prove that whilst there was a paper transfer and that the ostensible legal title was vested in W. J. Knight, transferee, yet in truth and in fact he was not the owner, but was merely the agent or trustee, of the actual owners.

In the decision above mentioned, Mr. Justice Brewer, the organ of the court, announced the rule to be, with reference to the admissibility of parol testimony to establish a resulting trust, as follows:

> "The general proposition is unquestioned that, where upon a purchase of property the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust immediately arises, and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds."

The nature of the trust created, or sought to be created, by a transfer, the learned justice says, may be established by parol. In the opinion just cited, at the bottom of page 405, we find the following language :

> "While we agree to the proposition that parol testimony to overthrow the legal effect of conveyances must be clear and satisfactory, yet we think that this case comes within the scope of that rule, and that it is certain that just such an agreement was made between husband and wife as the appellant asserts."

It must be remembered that in this case petitioners are endeavoring to show that no property rights whatever were ever vested in the community existing between Wm. J. Knight and his wife, Mrs. Mary K. Knight, which was dissolved by her death in 1885. The respondents in this case are claiming by inheritance as heirs at law of their mother.

It must be borne in mind that respondents, having claimed by this suit an undivided half interest in the

land by inheritance from their mother, have accepted her succession unconditionally, which in the language of the Civil Code of Louisiana—

> "is the transmission of the rights and obligations of the deceased to the heirs." Art. 871.

If the mere fact of placing this tittle in the name of the husband at the time of the existence of the marriage—although he had not paid anything therefor, and although he had agreed to hold it subject to the control of the real owners—brought it into the community so as to transfer the title by inheritance to the heirs of the mother, upon the dissolution of the community by her death, we still insist that her obligations descended to her heirs who are bound to the same extent that her interest in the community could have been bound by a suit brought during her lifetime.

The Supreme Court of Louisiana has held that:

> "It would be monstrous to pretend that the wife or her heirs is a third person to the husband in a technical sense, in the face of the admitted principle that she could control no acts done by him as the head of the community until after dissolution of the marriage, and then only by the express ground of fraud (C. C. 2373; 9 L., p. 452)."
>
> Caldwell *vs.* Henning, 5 Rob., p. 25.

In Smithsonian Institution *vs.* Meech, *supra*, the question at issue for determination was whether property purchased during the lifetime of Mr. and Mrs. Avery, standing of record in her name, but paid for by the husband, belonged to him so as to be the subject of disposition by last will and testament, and the court propounded and determined the following question in the affirmative:

> "If it is true that the purchase price was paid by Mr. Avery, and the title conveyed to Mrs. Avery

under an oral agreement, such as is described, will equity enforce this as against those claiming the record title?"

And parol evidence was admitted *by the court in that case to show the nature of the trust.*

Now if parol testimony is admissible in a case to show that the title to property, although standing of record in the name of one person, belongs to another, because the other person paid for it, why is not parol testimony admissible to show that although the record title is vested in one, no consideration was paid, and that the agreement was that the transferee was to hold it merely for the protection and convenience of the transferors?

In Smithonian Institution *vs.* Meech, supra, the reason why parol is admissible is well stated in a quotation from Perry on Trusts, in the following language:

> "Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention, though presumed in the first instance to be a provision and settlement; therefore any antecedent or contemopraneous acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered as part of the transaction may be received for the same purpose. And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time.
>
> "This is in accord with the general proposition so often enunciated, that the Statute of Frauds was designed to prevent frauds, and that courts of equity will not permit it to be used to accomplish that which it was designed to prevent. As said in Wood *vs.* Rabe, 96 N. Y., 414, 425:
>
> "'There are two principles upon which a court

> of equity acts in exercising its remedial jurisdiction . . . One is that it will not permit the Statute of Frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he can not conscientiously retain, the court, to prevent the abuse of confidence, will grant relief.'
>
> "And in Haigh *vs.* Kaye, L. R. 7 Ch. App., 469, 474:
>
> "'The words of Lord Justice Turner, in the case of Lincoln *vs.* Wright, 4 De G. & J., 16, where he said: "The principle of this court is that the Statute of Frauds was not made to cover fraud," express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property which he has obtained through fraud.'"

It is with respect suggested that the showing made by the petition and record warrants the issuance of a writ of certiorari to the lower court as prayed for.

Respectfully submitted.

A. P. PUJO,
Of Counsel for Petitioners.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 101.

LUTCHER & MOORE LUMBER COMPANY AND H. J. LUTCHER, PETITIONERS,

vs.

WILLIAM H. KNIGHT ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Brief on Behalf of Petitioners, Defendants in Original Suit.

SYLLABUS.

An action instituted by heirs claiming real property through inheritance from their mother, upon the allegation that the property was purchased during marriage and belonged to the community, against the record owner holding under a regular chain of title from the sovereign is a suit in equity, and a court of law is without jurisdiction to herein determine the rights of the parties.

The plea of *res judicata* can not be successfully interposed unless the pleadings in the former litigation show affirmatively:

That the thing demanded was the same; the demand

was founded on the same cause of action; the demand was between the same parties and formed by them against each other in the same quality.

Under the jurisprudence of Louisiana parol testimony is admissible to rebut the presumption that property purchased during marriage belongs to the community.

Under the jurisprudence of Louisiana parol testimony is admissible to show that an ostensible deed of sale was in truth and in fact not a sale, but a transfer charged with a trust to be executed by the trustee in favor of the *cestui que trust.*

Statement of the Case.

This case is before the court on a writ of *cc tiorari* to the United States Circuit Court of Appeals for the Fifth Circuit, to review a decision by it rendered, affirming the judgment of the United States Circuit Court for the Western District of Louisiana, in and by which respondents were adjudged to be the owners of an undivided half interest in and to certain lands of which plaintiffs were the owners by title of record.

March 11, 1903, respondents filed suit against the Lutcher and Moore Lumber Company and H. J. Lutcher (plaintiffs here), in the 12th Judicial District of Louisiana, sitting for the Parish of Vernon, to recover an undivided half interest in certain lands situated in said parish and State, as heirs at law of their deceased mother, Mary J. Cain, wife of W. J. Knight, alleging in substance;

That the lands to which they asserted rights of ownership had been purchased by their father, W. J. Knight, during marriage with their mother, Mary Cain Knight, and under the laws of the State of Louisiana belonged to the community of acquest and gains existing between them; that upon the dissolution of the community by the death of their mother, they as her heirs at law, became the owners of an

undivided half interest in the lands so purchased; that after the death of their mother, their father, without authority of law, sold all of said lands without opening her succession, and that such sales in so far as their interests therein were sought to be affected, were null and void and of no effect.

March 26, 1903, the cause was removed to the Federal Court upon the petition of defendants (plaintiffs here) October 5, 1903, the defendants filed what they called their first "Amended original answer," which was further amended on October 27, 1903 (Tr. 7 and 11).

On October 22, 1903, plaintiffs in said cause filed a special demurrer or motion to strike out certain portions of the answer, filed by defendants October 5, 1903. The record does not disclose what disposition was made of the demurrer.

The original and amended answers presented the following defenses:

(a) No cause of action.

(b) The general issue.

(c) Special denial of the quality in which plaintiffs sued.

(d) That the land sued for was the separate property of their father, W. J. Knight, by gift, had not been paid for by and formed no part of the community.

(e) That the title to the property was in W. J. Knight only as trustee for his vendors, Dan R. Knight and J. A. Lovett, who requested W. J. Knight to act in said capacity on the condition that the property so conveyed to him, in trust, should be held for the use and benefit of Dan R. Knight and J. A. Lovett, to be disposed of whenever directed or requested by them to do so; that W. J. Knight accepted the said trust subject to the conditions imposed and agreed to fulfill the same; that W. J. Knight paid nothing for the land, nor did he execute any note in payment therefor; and that afterwards W. J. Knight at the instance and request of Dan R. Knight and J. A. Lovett for whom he

held the title in trust, and in compliance with the agreement under which he accepted the trust, conveyed to Mrs. Viola P. Knight a one-half interest, and to J. C. Knight a one-fourth interest to the lands, retaining a one-fourth interest for himself; that subsequently Mrs. Viola P. Knight, W. J. Knight and J. C. Knight sold the entire property to defendants, the Lutcher and Moore Lumber Company; and that the conveyances by W. J. Knight was the execution and performance of the trust reposed in him and a compliance with the agreement under which he accepted the same; that when the title to the property was placed in the name of W. J. Knight by Dan R. Knight and J. A. Lovett no real sale ever took place between the parties, the land being received by W. J. Knight charged with the trust stated; consequently the same constituted no part of the community of acquets and gains existing between him and his wife, Mary Cain Knight.

(f) That when the property was purchased by defendants (plaintiffs here) there was no evidence of record, showing the marriage or death of Mary Cain Knight; that at said date W. J. Knight was married and his second wife was living with him; that all transfers affecting the land in question were seasonably recorded in the proper records in the parish where the lands were situated; and that the sales were executed and the purchases made by the defendants in good faith, without notice or knowledge of claims of any kind, or of the previous marriage or death of the first wife of the said W. J. Knight.

(g) That the transfer from Dan R. Knight and J. A. Lovett to W. J. Knight, dated July 28, 1882, was never intended as a sale by the parties thereto; that no money or other consideration was paid for the land therein described; that the transaction was merely a device on the part of J. A. Lovett and Dan R. Knight, commercial partners, then in a failing condition, to screen their property from the pursuit of their creditors; that it never became the property

of W. J. Knight or of the community, but always belonged to Dan R. Knight and J. A. Lovett until, under their instructions, the same was transferred to defendants (plaintiffs here) immediate authors; that the pretended sale was a simulation and a fiction; that all the vendors were closely related, and the proceeds realized therefrom were divided between Dan R. Knight and J. A. Lovett, who advised, counselled and procured the sales to be made.

(h) That the half interest acquired by G. Bedel Moore had been transferred to the Lutcher and Moore Lumber Company; that the defendants were entitled to call their vendors in warranty and to recover the amounts paid by them with interest, likewise the sums paid for taxes.

(i) Defendants prayed for judgment quieting their title and rejecting plaintiffs' demand, and for citation in warranty of their respective vendors, and in the event of eviction, for judgment against the plaintiffs for the amount paid by them for taxes, and against their warrantors for the reimbursement of the purchase price with interest, and attorney's fees incurred in defending suit.

The amended answer filed on October 5, 1903, charged the nature of the transaction between Dan R. Knight and J. A. Lovett and W. J. Knight, dated July 28, 1882, to be the result of an agreement that Dan R. Knight and J. A. Lovett should transfer and convey all the property movable and immovable owned by them to W. J. Knight, who should act as the agent and manager of their business, and of the property of Knight and Lovett; that W. J. Knight was to receive a salary for his service; that the movable property referred to in the transfer was to be converted into money, and an accounting made to Dan R. Knight and J. A. Lovett, and the lands were to be reconveyed to Knight and Lovett or transferred to such persons as they might designate; that said agreement was carried out by W. J. Knight. The movable property was sold by him, and the proceeds realized therefor accounted for to Knight and Lovett; that

the ownership of Knight and Lovett of the lands described in the conveyance of July 28, 1882, was always recognized by W. J. Knight, and in 1887 he offered to reconvey the lands to Knight and Lovett; and that acting under their request and instruction, on February 5, 1887, he did convey to Viola P. Knight, wife of Dan R. Knight, and authorized by him, a half interest in the lands; that at said date J. A. Lovett, former partner of Dan R. Knight, and then half owner of the land, did not desire to have his half interest conveyed to him, but wanted it sold; that the sale was effected to W. J. Knight and J. C. Knight, who purchased the half interest of Dr. J. A. Lovett, and W. J. Knight, who accordingly on the 7th of February, 1887, conveyed an undivided one-fourth interest in said lands to J. C. Knight and retained title in himself for the remaining one-fourth, until which date he owned no interest whatever in said property.

That the $500 cash consideration mentioned in the deed of July 28, 1882, was the money of Knight and Lovett; that the $14,500 note alleged to have been executed by W. J. Knight, representing the credit portion of the purchase price, was never paid in whole or in part; that the recital in the deed of Knight and Lovett to W. J. Knight that $500 of the purchase price was paid in cash, was error and untrue; in fact, no part of the purchase price was then paid, or ever afterwards, by W. J. Knight, or anyone else acting for him; that the transfer to W. J. Knight of said property did not constitute a sale, but only a paper title, and that he never in fact or in law became the owner of the property or any interest therein.

In the closing part of this answer defendants pleaded the prescription of one, two, four, five and ten years.

December 21, 1903, defendants in said cause No. 276, in the U. S. Circuit Court (plaintiffs here), filed an original bill in the Circuit Court of the United States for the Western District of Louisiana relating the nature of the transac-

tions and the history of the proceedings between all of the parties, from which bill the following paragraphs are quoted:

> IX. Your orators further show that the community of acquests and gains existing between W. J. Knight, and his alleged previous wife, Mary Cain Knight, never had any interest in or title to said property, or any part thereof; that W. J. Knight was simply and solely a trustee and agent of Dan R. Knight and J. A. Lovett; that the said W. J. Knight took said title with the distinct understanding and agreement that he would reconvey to said Knight and Lovett said land at any time they requested him to do so, and that if any title vested in said W. J. Knight, it was charged with said trust, and that the said W. J. Knight after the death of his alleged previous wife, Mary Cain Knight, executed said trust by conveying one-half interest in said land to the said Viola P. Knight, and by further conveying one-fourth interest in said land to John C. Knight and also by paying the said John A. Lovett for the remaining one-fourth interest in said land, and that his said alleged previous wife had been dead about two years before the said W. J. Knight ever acquired any real title to any part of said land.
>
> X. Your orators would further show that the (filing) of said suit as hereinbefore alleged, and the setting up of said claim to said land has clouded your orators' title to the same, and that said suit is at law, and that your orators' defenses are equitable, and that the pendency of said suit and the cloud cast on your orators' title work irreparable injury and damage to your orators, and that they have no adequate remedy at law.

The prayer of this bill was special and required the plaintiffs to set forth any and every adverse interest, claim or demand in the land so that the same might be justly adjudicated and declared null and void as against said orators. That orator's title to the land should be established and confirmed against the claims sought to be enforced by plaintiffs

in the suit pending on the law side of the court, and that a writ of injunction issue commanding the plaintiffs to desist from the prosecution of said action at law.

To this bill defendants filed a demurrer to the effect that the complaint came too late; that complainants' answer filed in cause No. 276, if sustained, would be adequate in law; that the allegations of plaintiffs' bill were merely a reiteration of the answer to the action on the law side of the court, which constituted a plea of estoppel; that the bill of complaint disclosed no right of action, and that complainants were without right under the law of Louisiana to file a suit in equity relating to the real estate in Louisiana.

This demurrer was sustained by the court, and complainants' bill in equity dismissed. (Tr. 101, 102.)

No appeal was ever taken and perfected from the ruling sustaining the demurrer, and trial of the case was proceeded with on the law side of the court.

On the trial of the cause defendants offered an amended answer to the effect and in the alternative, that should the sale from Knight and Lovett to W. J. Knight be held valid, then and in that event, the credit portion of the purchase price recited in the deed—$14,500—should be held as a debt against the community chargeable to plaintiffs proportionately, as it had been paid by the proceeds of the sale of the property after the death of Mrs. Mary Cain Knight. This amendment was not allowed by the court, to which exception was taken and perfected by bill. (Tr. pp. 67, 68 and 69.)

The case was tried by a jury upon the issues thus presented. A general verdict was rendered in favor of the plaintiffs. (Tr. p. 57.) The verdict was approved by the court after denial of a motion for new trial, and formal judgment entered thereon decreeing the plaintiffs to be the owners of an undivided one-half interest in the land sued for by them (Tr. p. 58.)

Bills of exceptions were reserved to the following ad-

verse rulings of the court: Disallowing the filing of the amended answer; excluding the depositions of Dr. J. A. Lovett, A. W. McCranie and T. J. Word; refusing to give the special charge requested with reference to the prescription of ten years pleaded by defendants; refusing to charge that before the plaintiffs could recover it would be necessary to show that the community had been liquidated, and to the refusal of the court to grant a new trial. (See bills of exceptions, Nos. 1, 2, 3, 4, 5 and 6, Tr. 60 to 74; No. 2, 67; No. 3, 68; No. 4, 70; No. 5, 71; No. 6, 71.)

The case was brought to the United States Court of Appeals for the Fifth Circuit by writ of error, and the judgment of the Circuit Court affirmed for the following reasons:

> "After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defence relied upon by plaintiffs in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law, we therefore affirm the judgment of the Circuit Court."

Then followed the application to your Honorable Court for *certiorari*, resulting in the issuance of the writ.

The Facts.

William J. Knight and Mary Cain Knight were married July 29, 1875.

The land, the subject-matter of this controversy, was transferred by Knight & Lovett, a commercial firm, composed of Daniel R. Knight and Dr. J. A. Lovett, to W. J. Knight, July 28, 1882 (Tr. p. 31).

Mary Cain Knight, wife of W. J. Knight, and mother of the respondents, died August 7, 1885.

On February 5, 1887, W. J. Knight transferred an undivided one-half interest in the land to Mrs. Viola P. Knight, the wife of Dan R. Knight, a member of the former firm of Knight and Lovett (Tr. p. 35).

On February 7, 1887, W. J. Knight transferred an undivided one-fourth interest in the land to J. C. Knight, a relative (Tr. p. 34).

On April 13, 1889, Mrs. Viola P. Knight, J. C. Knight and W. J. Knight sold the land transferred by Knight & Lovett to W. J. Knight, July 28th 1882, to plaintiffs herein.

The deed from the Knights to Lutcher and Moore was filed for record and recorded on April 24, 1889, in Book D, Folios 440 and 441 in the Conveyance Records of the Parish of Vernon (Tr. p. 37).

Although this case was tried on the law side of the court and before a jury, there appears a minute of evidence in the record. Reference thereto clearly establishes the fact that W. J. Knight and Mary Cain were married in 1875, lived together thereafter as man and wife until she died in 1885; that respondents herein were born of that marriage; that plaintiffs exercised acts of possession of the property by recording their deed and paying taxes thereon (Tr. pp. 23-24-25-26-27-30).

Jurisdiction.

Plaintiffs in the original cause, as heirs at law of their mother, assert a half ownership in property to which the defendants in the orginal cause (plaintiffs here), are holders by a regular chain of title from the sovereignty.

The title of plaintiff, if it exists, is equitable, and can not be adjudicated on the law side of the court.

> "Only a court of equity can compel the surrender of a legal title to land held by defendant and invest the plaintiff with it."
>
> Rufman *vs.* Cory, 129 U. S., p. 387.

> "The State practice will not be so far followed as to permit a suit founded upon a right that is purely equitable to be tried upon the Common

Law side of the court; or as to permit an equitable defense; or ~~her~~ equitable set-off to be pleaded in an action at law."

Foster's Federal Practice, Fourth Edition, vol. 2, section 360 (a), sec. 375.

"Legal and equitable causes of action can not be joined in the same suit, although this is permitted by the State practice."

90 Fed. Reporter, p. 711.

"A suit for the cancellation of a deed is equitable."

Foster's Fed. Practice, sec. 2, pg. 5.

Res Judicata.

Res adjudicata is statutory in the State of Louisiana and is defined by article 2268 of the Revised Civil Code of Louisiana, which reads as follows:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause or action; the demand must be between the same parties, and formed by them against each other in the same quality."

The basis of plaintiff's plea of res adjudicata is the record of certain suits instituted by creditors of Knight and Lovett against them and W. J. Knight, to subject certain property transferred by the former to the latter under the deed of July 28, 1882, to the payment of their debts. The creditors of Knight and Lovett had attached a certain lot of goods, wares and merchandise. W. J. Knight intervened in the case, claiming to be the owner by deed of sale duly recorded in Vernon Parish. On the trial of the case the court held W. J.

Knight to be the rightful owner of the property attached in the suit by virtue of the purchase thereof from the defendants by the act of sale executed July 28, 1882, and which act of sale was decreed to be real and not simulated.

Before an examination into the merits of the plea it is respectfully suggested that the same is not before the court for determination. The plea if good would put an end to the controversy. It should have been tried separately and decided, and was waived by going to trial on the merits without insisting on a separate trial.

Singleton *vs.* Smith, 4 La., 432.
Pearce *vs.* Frantum, 16 La., 414.

But if the plea is before the court, the facts in support thereof do not warrant that it should be sustained. It must be borne in mind that in this case the original plaintiffs assert that the land transferred to their father was acquired by him during marriage and became community property, one-half of which descended to them by inheritance from their mother. They deny that their father had the right to sell the property after the death of his wife, Mary Cain Knight, their mother. The defense urged, is that their father and consequently the community, acquired nothing by the transfer to him.

The thing demanded was not the same; the demand was not between the same parties and in the same quality.

The creditors in their attachment proceedings against Knight & Lovett, seized certain goods and merchandise. Their inquiry under the law was confined to the question whether the sale to W. J. Knight, the intervenor, of the goods attached, was, or was not, a simulation. For aught we know Knight might have shown the payment by him for the goods attached. It does not follow that if a con-

sideration existed for the transfer of the merchandise that a consideration also existed for the transfer of the land.

In support of the plea of res judicata there was no testimony offered to show whether the legality of the title to the real estate was in issue in the creditor's proceedings against Knight & Lovett, in which W. J. Knight intervened; or, even if the matter were in issue, whether the decision turned upon some other point in the case.

Such being the case we respectfully submit that *res judicata* does not apply.

Werlin *vs.* New Orleans, 177 U. S., p. 390.
Fincke *vs.* Martin, 5 La. Ann., 103.
Johns *vs.* Race, 48 La. Ann., 1170.

ARGUMENT.

May it please the court: The several assignments of error, present directly and indirectly for decision, the question whether parol testimony is admissible to show that real property acquired in Louisiana, during marriage, does not belong to the community of acquets and gains existing by virtue of the laws of that State, between the spouses. They will therefore be considered as one in the submission of the case.

The record shows that upon demurrer by defendants in cause No. 286, in the U. S. Circuit Court for the Western District of Louisiana, to plaintiffs' bill praying for an injunction against the further prosecution of cause No. 276, it was held that said cause was properly in a court of law, and the bill for injunction was denied. This ruling of the court was provoked by the respondents here, plaintiffs in the original action, and acquiesced in by the defendants there (petitioners here) and became *res judicata* as to them. The

effect of this ruling was to place the case on the law side of the court to be there disposed of according to the rules of practice governing the trial of such cases in the state of Louisiana. (U. S. R. Stats., Sec. 914.)

The issue created by the pleadings in this case is, whether the property sued for belongs to the community existing between W. J. Knight and his said wife, Mary Cain Knight, mother of the claimants, through whom plaintiffs claim as her heirs at law.

Article 2402, Revised Civil Code of Louisiana, reads as follows:

> What Belongs to the Community—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

It will be noted, the law declares that

> "* * * the estates which they may acquire during marriage * * * by purchase, or in any other similar way"

shall fall into the community. The above provisions of the law relied upon by the plaintiffs in said cause No. 276, establish such resultant ownership upon two conditions: First, that the property shall be acquired during marriage; second, that this acquisition shall be

> "* * * by donations made jointly to them both or by purchase, or in any other similar way." * * *

It is worthy of attention that the statute does not say

that all property placed in the name of either husband and wife during marriage, shall fall into the community. On the contrary, the community of acquets or gains consists only of that which may have been donated to the spouses jointly, or may have been purchased by them, or acquired in some other way in which property is usually acquired, such as by exchange, or in payment. The jurisprudence of Louisiana is uniform upon the proposition that the mere fact of the acquisition during marriage does not necessarily make the property fall into the community, but merely creates the presumption that the same belongs to the community. This presumption may always be rebutted by competent proof.

It has been held, though it be not so stated in the act, that the wife may show that property acquired in her name was purchased with her paraphernal funds under her own administration. When so established by proof the property is paraphernal and does not belong to the community. (30 An. p. 167; Succession of Rinard *vs.* Holtin.) Parol proof is admissible to establish such fact.

The contention of the defendants in the original cause was that, although the title to the property had been acquired by W. J. Knight, yet in truth and in fact, he had never owned it, had never paid anything therefor, was a mere trustee or agent of Knight and Lovett, one of the holders in the chain of title, under whose instructions he acted in transferring three-fourths of the property to their immediate authors, Mrs. Viola P. Knight and J. C. Knight; and that W. J. Knight had acquired his one-fourth interest in the property in 1887, after the death of his wife; and that by reason of these facts the property, although placed in the name of W. J. Knight during marriage, had not fallen into the community.

The trial court permitted the claimants to introduce evidence to prove the marriage of their mother to W. J. Knight, the date of her death, and the transfer by Knight and Lovett to their father, W. J. Knight, of the property in question;

but when the defendants in the cause offered parol testimony to show that the property was never purchased by W. J. Knight, ostensible vendee in the sale from Knight and Lovett, objection was sustained to the admissibility of parol proof to establish such fact, and defendants were not permitted to rebut the presumption of the community flowing from the transfer of the property to W. J. Knight during marriage.

The actual result of this ruling by the court, was to deny to the defendants in the cause the right to substantiate the defence to plaintiffs' action, set up in their answer. The case was at law, the court had so ruled at the instance of the plaintiffs. The defendants at law had the right to prove any fact by competent testimony which would tend to defeat plaintiffs' right to recover, and the exclusion of parol testimony by the trial court and the affirmance of such ruling by the Court of Appeals on the ground that the defences were not cognizable in a court of law, was prejudicial error.

The evidence offered by the defendants to show that the transfer to Lovett was not a sale, but merely an arrangement between Knight and Lovett, the owners, and W. J. Knight, the transferee, whereby the latter would handle and dispose of their property for their benefit and in accordance with their instructions, was not for the purpose of establishing title to real estate, but to rebut the presumption that the property belonged to the community because purchased during marriage.

The court did not state its reasons for maintaining the objection to the admissibility of this testimony, but objection was made that parol testimony could not be admitted to "change, vary or prove title to real estate," and was no doubt based on Articles 2275 and 2276 of the Revised Civil Code of Louisiana, requiring

"transfers of immovable property to be in writing

* * * and prohibiting the admission of parol evidence against or beyond what is contained in the case."

Parol evidence, however, was admissible under the jurisprudence of Louisiana, as we construe it, and likewise under that of other jurisdictions.

It will be borne in mind that defendants in said original cause (plaintiffs here) as to W. J. Knight, and likewise as to respondents, were and are third parties holding under title translative of property, without notice, and for a valuable consideration.

In their answer upon which the case was tried it was in substance set forth that W. J. Knight was a substituted person, holding for the real owners, Knight and Lovett; that the transfer to him was without consideration, never intended as a sale, and was merely a fraudulent device to screen their property from the pursuit of their creditors, and was a simulation and a fiction. The real attitude of the claimants herein is to benefit by the conveyance of Knight and Lovett who transferred their property to their father, W. J. Knight, in order to screen it from the pursuit of their creditors. Parol is always admissible to show simulation (29 An., p. 507; Herbert et al *vs.* Ledge et al.; p. 17, Brief).

Third persons may prove fraud and simulation by parol in the acquisition of real estate (34 An., p. 1243; Tell *vs.* Fish; 4 Robinson, 291; Tutorship, 4 R., or Hackett).

The transfer of 1882 by Knight and Lovett to W. J. Knight was a simulation as a sale; and in truth and in fact was the creation of a secret trust and in fraud of the law. If Dan R. Knight and Dr. J. A. Lovett had died before disposition by W. J. Knight of the property transferred to him, their heirs could have brought a bill alleging the secret trust and the reason whereof, and W. J. Knight would have been compelled to answer, notwithstanding the statute of frauds.

> "If a testator make a devise, or a grantor a conveyance, upon a secret trust in fraud of the law, or for a purpose forbidden by law, or contrary to public policy, those interested may bring a bill alleging the secret trust, and the fraud upon the law, and the persons to whom the devise or conveyance was made must answer, notwithstanding the statute of frauds. If such fraudulent trust appear by the answer, or by any clear and explicit proof in opposition to the answer, a trust will be declared and enforced in favor of those interested in the estate, or in the event of the failure of the illegal trust. In all cases of actual fraud parol evidence is admissible, otherwise a fraud put in writing would always escape."
>
> Perry on Trusts, Sec. 216, p. 313, Vol. 1.

It is no longer questioned but that a trust may be established and proved by parol, Secs. 75 and 76, Perry on Trusts.

Our contention, however, goes further. The agreement under which the lands were transferred by Knight and Lovett to W. J. Knight in 1882, creating a trust or an agency in the said W. J. Knight, as the case may be, although offered to be proved by parol only, was continuously recognized and executed by him in writing, by sale from him to Viola P. Knight and J. C. Knight in 1887. Both of these sales had been directed by Dan R. Knight, half owner, and Dr. J. A. Lovett, owner of the other half of the land, who at that time disposed of his half interest to J. C. Knight and W. J. Knight.

The defences made were strictly within the law, and the evidence should have been admitted in support thereof.

> "Sometimes a proof of the fraudulent intent depends upon the establishment of a secret trust between the parties, and in all cases when a fraud is established a grantee is treated as a trustee for the creditors. Such a trust, however, is not a trust between the parties to the transaction to be set up and enforced by the *cestui que trust* or his representatives.

> It is a question of fraud by reason of a secret transaction with fraudulent intent affecting the validity of the transfer. Hence, the doctrines of the law as to the proof of a trust, whether it may be by parol or must be in writing, are not involved. The question is one of fraudulent intent, and such intent may be proved by any kind of evidence by which fraud may be proved."
>
> Bump on Fraudulent Conveyances, 4th Ed., Sec. 592.

But admitting *arguendo* that parol testimony was not admissible to show that the transfer from Knight and Lovett to W. J. Knight, was the result of fraudulent conspiracy between the parties, for the purpose of placing the property beyond the reach of their creditors, and was in truth and in fact not a sale, but merely a sham, for the reason that such fact could only be established in writing, yet the right would still inhere in the defendants to show that the property transferred by W. J. Knight, although acquired during the marriage, did not belong to the community. The claim that the same did belong to the community was the foundation upon which original plaintiffs based their rights. If the property did not constitute a part of the community, they had no right of ownership therein. This was a fact to be proved by the plaintiffs as a condition precedent to recovery.

After the testimony of plaintiffs had been introduced in the cause, defendants had the right to have their day in court, upon the vital matter at issue. This was denied to them by the rejection of the evidence offered to show that the property constituted no part of the community. The deposition of Dr. J. A. Lovett, which should have been received in evidence, shows that W. J. Knight at the time of his purchase was a clerk and employee of Knight and Lovett; that he was related to Dan R. Knight; and was to exercise the duties of a trustee, or agent, for compensation. These facts have material bearing upon the contention of

the defendants and should have been considered by the jury. The testimony bears out defendants' theory that the community of acquets and gains resulting from the marriage *quo ad* the property in question "possessed nothing, earned nothing, invested nothing." (Succession of Rogge, 50 An., p. 1228.)

In the same decision the court applied the principle that parol evidence was admissible to show that the property did not belong to the community, using this language:

> "While it is true that property purchased during marriage, whether in the name of the husband or wife, is presumed to belong to the community, it is a presumption which may be rebutted."
> Succession of Rogge, 50 L. An., p. 1227.

Again:

> "It is a well settled question that the property acquired during community is presumably community property; without dissent, doctrine and jurisprudence sustaining that principle. It has, none the less, frequently been decided that it is by no means a conclusive presumption; that it may be shown by competent evidence that it is the property of one of the spouses and not at all the property of the community."
> 48th L. An., p. 785.

If it can be proved that the property purchased during marriage does not belong to the community but is the property of one of the spouses, why can it not be shown that it is not the property of either?

> "The spouses, parties to acts of purchase, have sometimes imagined that the declaration contained in the act was sufficient to sustain the title claimed; in other words, if the declaration was in the act property bought with the separate funds of the wife, it carried with it the title. In disapproval of this

> heresy this court has said that 'the' married woman must produce proof *dehors* the act of sale to establish her title."
> (See 48 L. An, pp. 783 and 785.)

The heirs at law of Mary Cain Knight claim half ownership of the property in question because it was transferred to their father, W. J. Knight, during marriage. The Louisiana Supreme Court in determining whether or not property belongs to the community has said:

> "Where property has that character the burden rests upon the wife or husband who claims it as a separate estate to establish ownership by positive evidence, *dehors* the recital of the act, which alone proves little or nothing. This is done by proving not only the origin of the facts *provenance des deniers*, but also the actual investment of the same. This is required whether the claim be raised as against creditors, heirs or anyone else."
> (35 L. An., p. 571.)

To recognize the rights of claimants and respondents, asserted herein, would be to permit them to profit by the acts of their father, who entered into an illegal arrangement with his transferors, Knight and Lovett, by which the former avoided the payment of their just debts to their creditors, and the latter had property placed in his name, for which he paid nothing, and which was purchased in good faith by petitioners herein. W. J. Knight never held the property under any other color or right than as trustee. Even without agreement there would have been an implied obligation on his part to return the property to the transferors, the original owners.

In Gaines *vs.* Chew, 2d Howard, 648, the court stated the case to be as follows:

> The plaintiff sets up a claim under the law of inheritance to lands, slaves, and a variety of movable

property; that these are proper subjects for the exercise of the jurisdiction of district courts can not be doubted; but the petitioner proceeds further, and alleges the nullity of the will, which constitutes the very title under which the defendant holds property in controversy. Before what court then must the validity of this will be tested? * * *

If the fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may become necessary. The powers of a Court of Chancery, in this view, are required to do complete justice between the parties.

This remedy under the Louisiana law, and before the Louisiana courts, of ordinary jurisdiction, would be undoubted. For, although those courts cannot annul the probate of a will, when presented collaterally, as a muniment of title, they inquire into its validity. Under the peculiar system of that state the forms of procedure being conformable to the civil law, are the same in all cases. But the Circuit Court of the United States, exercising jurisdiction in Louisiana, as in every other State, preserves distinct the common law and chancery powers. In either the State or Federal court the relief is the same; the difference consists only in the mode of giving it.

It is insisted that trusts are abolished by the Louisiana code, and that, consequently, that great branch of equity jurisdiction cannot be exercised in that State.

Art. 1507 of the Civil Code declares: "That substitutions and *fidei commissa* are and remain prohibited." "Every disposition by which the donee, the heir or legatee, is charged to preserve for, or to return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee," etc.

This abolishes express trusts, but it does not reach

> nor affect that trust which the law implies from the fraud of an individual who has, against conscience and right, possessed himself of another's property. In such a case the Louisiana law affords redress as speedily and amply as the law of any other State. There is, therefore, no foundation for the allegation that an implied trust, which is the creature of equity, has been abrogated in Louisiana. Under another name it is preserved there in its full vigor and effect. Without this principle, justice could not be administered. One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust for the rightful owner.
>
> Howard's Reports, Vol. 2, p. 650.

Considering the case from either point of view, as a suit in equity or an action at law, the original defendants were entitled to make their defences by parol proof. Mr. Story says:

> In the next place the same general rule prevails in equity as at law, that parol evidence is not admissible to contradict, extend, or vary written instruments; and that the interpretation of them must depend upon their own terms. But in case of accident, mistake, or fraud, Courts of Equity are constantly in the habit of admitting parol evidence to qualify and correct, and even defeat the terms of written instruments.
>
> So they will allow parol evidence to rebut a presumption, or any equity arising out of written instruments. But in these latter cases they do not interfere with or repel the proper construction of the instrument itself, but only the artificial rules of presumption or of equity, which they themselves have created or applied to cases perfectly indeterminate in their nature, and admitting of either construction according to the real intent of the party. (Story Equity Jurisprudence, Sec. 1531, Vol. 2, p. 857, 13th Ed.)

It will be noted that this eminent authority declares parol

evidence admissible "to rebut a presumption." This principle, as shown by the authorities heretofore cited, has been crystallized into the jurisprudence of Louisiana. In Bachino *vs.* Coste, 35 Ann., p. 572, the court said:

> "This is an action to compel compliance with the terms of sale of a piece of property adjudicated to the defendant. * * * The property was purchased in the name of the plaintiff during marriage; the act contains recital of the origin of the funds with which it states the acquisition was made, and it was signed by the husband. The latter died a short time before the adjudication of the property to the defendant, leaving four children, the issue of his marriage with the plaintiff, two of whom were minors."
>
> The defence was that the property was presumed to belong to the community.

The court in commenting upon the obligation of the wife, plaintiff in that case, to show beyond the recitals of the deed to her of the property that the same had been purchased with paraphenal funds, said:

> Requiring such proof from a married woman is imposing upon her no unauthorized or unjust hardship, or putting her to no undue convenience.
>
> It may happen that property may stand in the name of a married woman so that her title may be indisputable on its face. For instance, where the same changes anterior to the marriage, or is mentioned in the contract of marriage, in whatever character, or was inherited by or donated to her before marriage; but this is not invariably so.
>
> Where, however, she has invested funds truly paraphenal during marriage in a piece of real estate, and she offers to sell it, and her offer is accepted, it would be impossible for her to prove her title on the face of the act. She would necessarily be driven to extraneous proof, written or oral, or both, as the case may be; but the purchaser who has agreed to buy must submit to that sort of evidence.

We submit that the same rule applies to plaintiffs in the

original cause, respondents here. They claim by inheritance the ownership of property bought by their father during marriage. Under the law of Louisiana property so purchased is presumed to belong to the community. But the holders of title by purchase from their father, without notice of any equitable claim against the property, are entitled to rebut the presumption flowing from its acquisition during marriage. This is no longer an open question under the jurisprudence of Louisiana. A case recently decided by the Supreme Court of that State seems to settle the question absolutely.

A father purchased a lot of ground in the city of Crowley, La., in the name of his minor daughter. In the act of purchase it was declared that the father represented his daughter as natural tutor. The lot was subsequently sold by her father before the minor became of age, passing through several hands, until it became the property of defendant Lawrence. After attaining the age of majority the former minor instituted suit, claiming ownership on the ground that the sale made by her father was a nullity.

> The defendant invoked his good faith and the good faith of his authors. He avers that plaintiff's father acted without authority of law in placing the property in her name, and that he did it in order to protect it from the pursuit of creditors; that it was put in his name as the natural tutor of plaintiff but that it was for his benefit and advantage. He charged that the purchase was a simulation, and that the father was absolutely insolvent. La. Reps. 118, p. 462.

Upon trial of the cause verbal testimony was admitted over the objections of the plaintiff; that it proved title to immovable property by parol. In passing upon the objection, the Supreme Court held the evidence to have been properly admitted, citing Gaidry *vs.* Lyons, 29 La. Ann., p. 4; Frazer *vs.* Pritchard, 6 La. Ann., 728; Steward *vs.* Looney & Wells, 23 La. Ann., 624.

In considering the admissibility of parol evidence, the court said:

> Proof of insolvency also was admissible. To prove motive the verbal testimony was admissible. Defendant was resisting in a legal manner, he was on the defensive and was not attempting to prove the legality of his own title.
>
> Plaintiff has never been the owner of the property, and the purpose of the verbal testimony was to show that fact. Plaintiff's father had no authority to buy in her name. The property was owned by some one. Who was it? Not the daughter; for the tutor is without authority to buy immovable for his minor child. Succession of Mitchel, 33 La. Ann., 354; Civ. Code, Art. 353; La. Reps. 118, p. 463.

The language of this decision just quoted applies with peculiar force to the facts under consideration in this case. W. J. Knight was never the owner of the property transferred to him by Knight and Lovett, and the purpose of the deposition of Dr. J. A. Lovett and the proffer of the witnesses, T. J. Word and A. J. McCranie, was to prove that fact. The testimony was competent and should have been received by the court. It was claimed by the plaintiff in the Lyon case that the first purchaser of the lot well knew that the father was acting as a natural tutor of his minor daughter; that this fact was recited in the act, and that he could not contend that the property belonged to the father and not the daughter. The court in considering this phase of the case said:

> But it also appears by verbal testimony that the knowledge which the first purchaser had of the fact that the vendor was the natural tutor, is supplemented with his evidence that the father had told him that his purpose was to buy the property and place it in the name of his daughter in order that it might be protected from all possible claims of his creditors, and that it was a purchase made by the father for his own account. La. Reps. 118, p. 464.

On the trial of this case as against these heirs who claim by inheritance from their mother, it is competent to show, and the defendants in the original cause had the right to prove by parol, that when W. J. Knight transferred the property to Mrs. Viola P. Knight and J. C. Knight that no consideration was paid by them to him; that the only consideration whatever that was paid was from J. C. Knight to J. A. Lovett, and by W. J. Knight to J. A. Lovett for his half of the property, and that the said transfers by W. J. Knight was in conformity with the instructions and directions of the real owners of the property for whom he held title.

It will serve no useful purpose to multiply authorities upon the point under discussion, as the right seems to be well recognized both in suits in equity and actions at law that parol evidence is admissible under the pleadings in a case of this nature. Wherefore, petitioners respectfully submit that the judgment of the Circuit Court of Appeals and of the Circuit Court for the Western District of Louisiana should be annulled, avoided, and set aside, and the case remanded to be proceeded with according to the views and instructions of your Honorable court.

Respectfully submitted.

A. P. PUJO,
GEO. E. HOLLAND,
Of Counsel.

APPENDIX.

Extract from Brief of Counsel for Plaintiffs in Error when the Cause was Submitted to the Circuit Court of Appeals.

ARGUMENT.

I.

This case having been reversed on the former appeal by this court on account of the petition for removal from the State Court being defective, and upon its return to the Circuit Court, such petition having been amended upon leave of that court, and in that court, the question is submitted whether or not such proceeding was proper and did the Circuit Court by such amendment retain and hold jurisdiction of the cause. This is submitted without argument and at this stage of the proceedings because the question is a necessary one to be determined.

II.

The true consideration for a conveyance of land can be shown by parol, even if it varies or contradicts the recitals in the deed.

The foregoing proposition, we submit, is almost elementary, and under it the testimony sought to be admitted on the trial of this cause was admissible. None of the objections offered to that testimony were relevant. It has been too often decided that it does not vary or contradict the deed to show by extrinsic evidence the

true consideration to be seriously considered. The question of res judicata has absolutely no bearing on the question whatever.

> "That parol evidence is admissible to show notwithstanding the acknowledgment of the receipt of purchase money in a deed, that the money was not in fact paid, is well settled."
>
> Gibson *vs.* Fifer, 21 Texas, 263.

Parol evidence is admissible to determine the character of the estate.

Higgins *vs.* Johnson's Heirs, 20 Texas, 389.

The real consideration for a deed may always be inquired into.

Irvine *vs.* McKeon, 23 Cal., 472.

III.

The presumption arising from the conveyance of real property to the husband during the marriage partnership that it belongs to the community can be rebutted by any relevant evidence showing such presumption untrue.

The presumption that property bought during the existence of the Community is community property may be overcome by proof.

Bartells *vs.* Souchon, 48 La. Ann., 783.

The presumption that the property acquired by the husband or wife during the existence of the marital relation is community property is not conclusive, but may be overcome by evidence.

Weymouth *vs.* Hawtells, 34 Pac. Rep., 109.

The presumption that all property acquired by either

spouse during the existence of the community belongs to the community is not conclusive, but may be rebutted.

Smith *vs.* Smith, 73 Am. Dec., 533.
Althof *vs.* Conheim, 38 Cal., 233.
Smalley *vs.* Lawrence, 9 Rob. (La.), 210.
Ford *vs.* Ford, 1 La., 201.
Labbe's Heirs *vs.* Abat, 22 Am. Dec., 151.
Bryan *vs.* Moore, 13 Am. Dec., 347.
Bachino *vs.* Coste, 35 La. Ann., 570.
Moore *vs.* Stauset, 36 La. Ann., 819.
Wood *vs.* Wheeler, 7 Texas, 20.

And such was the Spanish law.

Scott *vs.* Ward, 13 Cal., 471.
Yeats *vs.* Houston, 3 Texas, 452.

If it can be established that property purchased during the marriage was purchased with separate funds, it remains separate property.

Moore *vs.* Moore, 63 Cal., 12.
Dominguez *vs.* Lee, 17 La., 295.

It may even be shown by extrinsic parol testimony that property standing as the separate property of one of the spouses is in fact community property and subject to the payment of community debts.

Pontiac Buggy Company *vs.* Dupree, 56 S. W., 703.

Other cases bearing upon the proposition, see—

In re Boody's Estate, 51 Pac. Rep., 634.
Word *vs.* Owens, 48 S. W. Rep., 200.
Succession of Rogge, 50 La. Ann., 1220.
Neiher *vs.* Arnigo, 54 Pac. Rep., 236.
Mannings *vs.* Burke, 107 La. Ann., 456.
Strong *vs.* Eakin, 66 Pac. Rep., 539.

The authorities cited are only a few out of the great mass of authority holding that the legal presumption

mentioned can be rebutted. The presumption is not conclusive, but simply, like any other presumption of fact, can be overcome by preponderance of the evidence. Defendants in this cause were certainly entitled to have their testimony weighed by the jury, and under a proper charge have the jury by their verdict determine whether or not the testimony offered overcome the presumption that the property was the community property of William J. Knight and his deceased wife. Upon defendants' theory it was never the property of the community and never was intended to be, and the community had no beneficial interest in it, and plaintiffs relied solely on the presumption of law to establish their claim and it is obvious that defendants should have been permitted to introduce their testimony to rebut the presumption and show their defenses to be true. Plaintiffs stood in no better position than their mother during her lifetime and had she been divorced from her husband and sought to divide this property, claiming it to be community, it would not be claimed, we take it, that she would be entitled to any interest in it. The property was not acquired in any manner that would make it onerous. It was in the nature of a gift. Its character was very well stated in the case of Velten *vs.* Carmack, 20 L. R. A., 101. Plaintiffs had the burden of showing title in themselves. Certainly any proof by defendants that would rebut a presumption that they had little would be admissible.

IV.

Where a purchaser acquires all paper title to real property, there is no inhibition against his showing by any relevant testimony that his title is good against and superior to any title not apparent in the chain.

It will be borne in mind by the court that defendants hold their title by regular chain of conveyance from the

sovereignty. Their chain is perfect and without apparent flaw or blemish. Defendant's claim is through a title not apparent of record and not discoverable from any investigation of the lands or the title.

It is no contradiction or variance of a deed to introduce parol evidence to show that the real consideration of the deed was separate property.

Peck *vs.* Vandenberg, 30 Cal., 42.

Land conveyed by bargain and sale to a married woman, although prima facie common property, may be shown to be separate property by extrinsic evidence that it was intended as a gift, and such evidence does not contradict or vary the deed.

Higgins *vs.* Higgins, 46 Cal., 259.

Parol evidence is likewise admissible to show that a gift, though joint to the husband and wife on the face of the deed, was intended and should operate only as a gift to the wife.

Dunham *vs.* Chatham, 21 Tex., 244.

V.

Where during the marriage relation land is deeded to the husband showing the purchase money unpaid, the legal title remains in the vendor, and there is no presumption that the land belongs to the community unless it is shown that the purchase money has been paid.

The above proposition presents an equitable doctrine. The ownership in the property is shown by the conveyance to be qualified and limited; the interest owned is apparent. In the deed under consideration the price was $15,000, $500 of which was paid, and so far as the record shows and the facts are, the $14,500 was never paid, except by the sale of the land. Under this state

of facts upon the face of papers, the community could only own a one-thirtieth interest in the land, or to put it plainer would only have a charge against the land for the sum of $500. It might be that if the land should be sold for profit the community would be entitled to the profit, but no such state of facts exists. The record here shows the superior title was never in the community. It shows that only one-thirtieth of the purchase price was ever paid and further testimony was offered to show that no part of the purchase price was ever paid by the community.

Until payment vendor has superior title.

Howard *vs.* Davis, 6 Texas, 174.

Where the purchaser has long been in default, his vendor being the possessor of the superior title, may make valid conveyance of the land.

Thompson *vs.* Robinson, 93 Texas, 170.

The equitable estate of the vendee, where the purchase price is not fully paid is alienable, descendible, and devisable in like manner as real estate held by legal title, but his title is an equitable one, the legal title remaining in the vendor until the payment of the purchase price.

Lewis *vs.* Hawkins, 23 Wall., 119.

It follows from the common doctrine of trustees that where one purchases with funds belonging to another and takes the title to himself, and when in trust for him who furnished the money, and where but a part of the money is furnished, the equity attaches pro tanto.

McAllister *vs.* Farley, 39 Tex., 552.

Real property purchased by a married woman in her own name, partly with money belonging to her becomes

in part the separate property of the wife and in part community property.

Loring *vs.* Stuart, 21 Pac. Rep., 65.
Schuyler *vs.* Broughton, 70 Cal., 282.

Property purchased in the name of the wife partly with funds of her separate estate and partly with money borrowed during the existence of the community, is the separate estate of the wife to the extent to which funds of her separate estate are used and community property to the extent to which such borrowed money is used in its purchase.

N. & P. H. Bank *vs.* Rauch, 61 Pac. Rep., 516.

VI.

Where plaintiffs claim title to land as heirs of their mother against purchasers from their father who holds the regular paper title, and introduce such regular title into the defendants, proof of the death of the mother prior to the sale by the father coupled with the presumption of fact arising from the deed to the father being in the lifetime of the mother making the property community, is not sufficient to permit a recovery where in the deed to the father it is shown that only one-thirtieth of the purchase price has been paid and twenty-nine thirtieths has not been paid, and the superior legal title is never shown to have passed.

Plaintiffs' entire claim is based on a presumption. Before a presumption can arise that the community owns property, it must be shown that it has acquired it. An interest in property may be acquired by purchase and the payment of one-thirtieth of the consideration, but it is a self-evident proposition that the entire property is not acquired by any character of title, onerous or lucrative, and no presumption could arise vesting title under such a conveyance. At best the presumption

of ownership could only extend to the interest apparent and in the case at bar, an undivided one-thirtieth. There is absolutely no evidence of or contention that the community of William J. Knight and his wife ever owned or claimed the unpaid twenty-nine-thirtieths in the land sued for and surely his heirs could not recover it. The burden would rest in the absence of a presumption on the plaintiffs to show that the community owned the property sought to be recovered, and in this case, that the purchase price had been paid during the existence of the community or at least afterwards, either positively or by presumption with community funds. We submit that this proposition is self-evident.

VII.

Lands held by the husband in trust for others and in which he has no beneficial interest, are no part of the community property of himself and wife.

If the lands in controversy were held by William J. Knight in trust for others, and it is permissible to show this fact, then plaintiffs could not recover, the entire title being based and resting upon the good faith ownership of the lands by the community

In a well considered case where the father had conveyed lands to his son by absolute deed without retaining any lien, reciting an adequate, valuable money consideration as paid, during the existence of the marriage relation between his son and his son's wife, the question arose as to whether or not this property was community property. The presumption of law was that it was. The facts established conclusively the sale and conveyance during the marriage relation. Testimony was offered and admitted to the effect that no actual consideration was passed, but that the conveyance was made by the father to the son simply as a trust, placing the title in the son

so that he could qualify as a bondsman of the father as postmaster. In passing upon the case, the court say:

> "The testimony admitted, it is clear, that the deed to N. W. Harris, if effective at all to pass the title, passed it to him solely in the capacity of trustee and no such partnership or community interest vested in him or his wife as would warrant the recovery sought."
>
> Crenshaw *vs.* Harris, 41 S. W., 392.

Parol evidence is admissible to show that no consideration was paid for a deed, the grantee being a mere conduit and title in a third person for the purpose of showing that the grantee's wife had no right of dower.

Fontaine *vs.* Boatman's Savings Inst., 57 Mo., 552.

When a person, to avoid payment of an anticipated judgment, conveys his property to a friend under a secret trust, who, after the grantor's death, conveys it to his executors, parol evidence may be given by the widow in an action for her dower, that no consideration was paid for the first deed to establish the fact that the grantor died seized of an equitable estate or inheritance.

Brown *vs.* Pitney, 39 Ill., 468.

Parol evidence is admissible to show that the consideration in a deed reciting a valuable one was the interest of the grantee's wife in the land and the giving by her of other deeds for the purpose of showing a resulting trust in her favor in an action by her heirs.

Nichols *vs.* Nichols, 133 Pa., 438.

The case of Vellen *vs.* Carmack, 20 L. R. A., 101, was a case wherein the deed from a father to his daughter expressed a money consideration, but was in fact a donation and this was shown by parol testimony, the court using the following language:

> "So parol testimony is admissible to show that a deed expressing a money consideration was in

> fact an advancement. Such testimony is offered not for the purpose of contradicting the recitals of the deed, but to show in a settlement among the heirs that one or more has already received a certain amount by way of advancement and should not have an equal share of the remainder."

Citing Brummet *vs.* Weaver, 2 Oregon, 170, the court announces the rule that a married woman may change one species of her property for another and to impress upon it the character possessed by the original property and that by this rule the source from which a married woman derived property may be inquired into for the purpose of ascertaining the means whereby the title to the property had been acquired and under this rule, it is competent to show the real consideration for the conveyance, not for the purpose of contradicting the deed, because no question is raised as to its genuineness, but for the purpose of showing the source from whence the real consideration sprung.

This case with its note is an instructive case on the proposition submitted to the court.

VIII.

It can always be shown by parol that lands standing in the name of one spouse are held in trust for others, and that such spouse or the community has no beneficial interest.

This proposition follows necessarily if the foregoing proposition, No. 7, should be established, admitting proposition No. 7 to be good law, this proposition becomes necessary to enforce it.

In an action by the grantor to recover the consideration recited in a deed, parol evidence is admissible that the only consideration was a promise by the grantee to hold the property in trust for the grantor and his children.

Toomey *vs.* Crowley, 137 Mass., 184.

In an action to determine whether a pauper was granted a settlement in a certain Parish, parol evidence is admissible that the consideration of two guineas recited in a deed to him was not paid, but that the property was a gift from his wife's father.

Rex. *vs.* Chevle, 3 Barn. & Add., 833.

Parol evidence is admissible to show that the consideration in the deed was paid by another than the grantee for the purpose of establishing a resulting trust, although contrary to the express recitals of the deed.

Millard *vs.* Hathaway, 27 Cal., 119.
Dorsey *vs.* Clark, 4 Harr. & J., 551.
Pritchard *vs.* Brown, 4 N. H., 397.
Dudley *vs.* Bosworth, 51 Am. Dec., 690.
Pomeroy's Equity Jurisprudence, 3rd Ed., vol. 3, section 1040.

X.

The community of acquets and gains consists of the residue after all debts have been liquidated and a recovery can not be had of property conveyed in liquidation of charges and debts against it.

The above proposition announces a rule of law almost universal, a rule based on equity; a rule that simply announces that a man must pay his debts before he can hold his property against his creditors.

Defendants in this cause sought to prove and could have proven by uncontradicted testimony that the price paid by defendants for the land in suit paid off and satisfied the $14,500 note outstanding against the property and given by the father of plaintiff. This debt was a community debt made so by the statute of Louisiana, and we contend that a sale of the property to pay that

debt by the survivor in community was an absolutely valid sale and passed the title. The testimony was admissible to show this state of facts and we believe the court erred in not permitting it to go to the jury.

The survivor has the power to settle up the community with or without statutory authority, either in court or out of it.

Haley *vs.* Bank, 26 La. Ann., 230.
Williams *vs.* Fuller, 27 La. Ann., 634.
Cook *vs.* Norman, 50 Cal., 633.
Sanger *vs.* Moody, 60 Texas, 96.

The survivor may convey or mortgage the community property entire for the payment of community debts.

Sadler *vs.* Kimbrough, 24 La Ann., 534.
Johnson *vs.* Savings Union, 63 Cal., 566.

The representative of the succession may sell community property to pay up community debts.

Succession of Myrick, 35 La. Ann., 292.
Davidson *vs.* Davidson, 29 La. Ann., 270.

Community property must satisfy common debts before descending to the heirs.

Wilson *vs.* Helms, 59 Texas, 680.

The survivor of a community may appropriate common property to the payment of community debts.

Johnson *vs.* Harrison, 48 Texas, 257.

The rights of minor children or heirs are residuary.

Curley's Succession, 18 La. Ann., 583.
Sadler *vs.* Kimbrough, 24 La. Ann., 523.

A surviving husband has power exclusive of statute for administration of estates of deceased persons to sell community property to pay community debts.

Gilette *vs.* Warren, 62 Pac. Rep., 975.

The husband has the power to mortgage community property to satisfy a liability arising on account of a bond executed by him as surety for another during his wife's lifetime.

Hinzie *vs.* Robinson, 50 S. W. Rep., 635.

The community in Louisiana for the purpose of liquidation and settlement has a fictitious continuation after its actual dissolution by the death of the wife.

Hook's Succession, 46 La. Ann., 353.
Dumestre's Succession, 42 La. Ann., 411.
Landreaux *vs.* Logue, 43 La. Ann., 234.

And for such purpose, the husband retains the custody and control of the community property.

17 La., 242.
2 La. Ann., 30.
12 La. Ann., 222.
23 La. Ann., 424.
25 La. Ann., 391.

And he may be even sued by the community creditors without the joinder of the heirs or personal representatives of the wife and held for judgment and community property validly sold and good title made against the wife's heirs.

Verier *vs.* Loris, 48 La. Ann., 717.
Hawley *vs.* Crescent City Bank, 26 La. Ann., 230.
Beard *vs.* Memee, 23 La. Ann., 424.
Recker *vs.* Pearson, 26 La. Ann., 391.

An administration of the deceased wife's estate is unnecessary for the purpose of divesting that of the community and vesting a complete title in a purchaser in the property sold.

McLean's Succession, 12 La Ann., 222.
Brown *vs.* Jacobs, 24 La. Ann., 526.

Heirs can not alien the land to the prejudice of the creditors and in fact and in law they have no right to the real estate or their interest, except that of possession, until the creditors are paid.

Watkins *vs.* Wolman, 16 Pet., 25.

One who has succeeded by inheritance to the estate of his mother, occupies the same position with reference to it as she would have done had she lived.

Cross *vs.* Allen, 141 U. S., 528.

When the community is dissolved by the death of one of the spouses, the survivor and the heirs are each seized of one undivided one-half interest in the community property, subject to the rights and privileges of the community creditors.

Succession of Giddens, 48 La. Ann., 356.
Newman *vs.* Cooper, 46 La. Ann., 1485.

As the community property is the primary fund for the payment of community debts, all such debts must be settled before the survivor of the deceased member can take any separate personal interest in the property.

Dixon *vs.* Dixon, 33 La. Ann., 1370.
Jones *vs.* Jones, 15 Texas, 143.
Tompkins *vs.* Tompkins, 12 Cal., 114.

In Louisiana the wife's interest in the community is residuary and she can have no interest in any of the property until the dissolution of the community and the payment of its debts. Her heirs stand actually in her position.

Tourne *vs.* Tourne, 9 La. Ann., 452.
Durham *vs.* Williams, 32 La. Ann., 163.
Succession of Boyer, 36 La. Ann., 506.

Until the community has been settled, the heirs of the

wife can claim nothing out of the acquets and gains where they have not been put in possession by the court.

Phelan *vs.* Ax, 25 La. Ann., 317.
Daniels *vs.* Ivey, 26 La. Ann., 639.

Community property after the death of the wife stands in the husband's name and he is personally liable for the debts. He is charged with the community debts and the heirs occupy the same position as their mother, and they can claim only the portion remaining after the payment of the community demands.

Williams *vs.* Fuller, 27 La. Ann., 634.
Woodley *vs.* Adams, 55 Texas, 526.
Jones *vs.* Jones, 15 Texas, 149.
Webre *vs.* Lorio, 42 La. Ann., 178.

The purchaser of community property sold for the payment of community debts acquires good title whether there be necessity for the sale or not.

Cage *vs.* Tucker's Heirs, 60 S. W., 579.

The sale in this case went unquestioned and undisputed for more than twenty years and it has been held that the existence of community debts and that the sale was made to pay community debts will be presumed in favor of a purchaser claiming title for a long time from the survivor in community.

Von Rosenberg *vs.* Perrault, 51 Pac. Rep., 774.

X.

The public records are the legal guides to intending purchasers of land as to their ownership, and one purchasing from the record owner for value in good faith gets title.

It stands proven by plaintiffs and uncontradicted in this case that defendants purchased a perfect record

title to the lands in controversy for value in good faith without notice of plaintiffs' title or claim and they have held and paid taxes on this title for more than twenty years.

The heirs of the decedent become vested with the title to such decedent's share immediately on his death, but they are bound to await liquidation to recover it.

Tugwell *vs.* Tugwell, 32 La. Ann., 848.
Glasscock *vs.* Clark, 33 La. Ann., 584.
Broad *vs.* Murray, 44 Cal., 228.

Where there are community debts and the surviving husband sells the cummunity lands, the purchaser is not obliged to see, even, that the proceeds are applied to the payment of community debts.

Cruse *vs.* Barkley, 70 S. W., 358.

The purchaser from the surviving husband of land conveyed to him during the marriage upon full consideration and without notice of the fact that the vendor had been married, takes good title against the heirs of the wife.

Hanzley *vs.* Lewis, 82 Texas, 595.

Where a husband holds the legal title to community lands, a purchaser from him after the wife's death takes the land free from the equitable community title of heirs, where he has no notice of such title.

Mangum *vs.* White, 41 S. W. Rep., 80.

Where a husband remained in possession of community real estate for fourteen years and sold same without objection to a bona fide purchaser for value, the law will presume that the sale was lawfully made, and this presumption will prevail to perfect the title of such

purchaser whether there were community debts at the death of the wife or not in a suit by the heirs of the wife.

Crary *vs.* Field, 61 Pac. Rep., 118.

One who holds a secret title, that is, not discoverable from the records, holds the burden of proving notice to a subsequent purchaser of the legal record title. The burden is not on the subsequent purchaser to prove want of notice.

Peterson *vs.* Macauley, 25 S. W., 826.

XI.

Payment of taxes is prima facie evidence of possession, and the payment of all taxes for more than ten years by persons holding and claiming land under just and valid title on its face, entitles such persons to a decision of the jury upon their plea of ten years' prescription.

That defendants are the holders of a legal chain of title from the sovereignty without a break or blemish, is undisputed. That they have paid all taxes and owned this land in this manner for more than twenty years is undisputed. That they have been in possession of the property, if necessary, is admitted in plaintiffs' petition. They were entitled to have the jury pass on the plea of ten years' prescription.

Conclusion.

The rights of the respective parties to this litigation are plain from the record. More than twenty years ago defendants purchased the property in controversy and paid full value for it, obtaining a perfect record title thereto, since which time they have paid all taxes and openly claimed the land. Plaintiffs, who claim that their mother died twenty years ago and who have acquiesced

with this sale and conveyance with full knowledge ever since, come now and against the good faith purchase of defendants urge their claim as heirs of their mother. They introduce in evidence a perfect chain of title to defendants, the deed to their father being during the lifetime of the mother and reciting a consideration of $15,000, only $500 of which by the deed appears to have been paid. They then prove the death of the mother and their heirship and rest.

We believe that, as the case then stood, judgment should have been decreed for defendants. They were shown to be innocent purchasers in good faith of the property, and as such the law should afford them protection in their title. Not only that; the plaintiffs did not undertake to show that the father and mother ever owned any beneficial interest in the property and made no effort to show the payment of the purchase price for the land by the community, or that it had ever been paid. Until it had been paid the community could not own the land, and their evidence showing that it had never been paid, in our judgment, should defeat their right of recovery. Had the deed to the father recited a cash consideration paid during the life of the mother, it might be the presumption arising that the property was community would render further proof unnecessary, but this presumption can not be extended and bring into the community of acquets and gains property which the record shows had never been acquired by it. The presumption can not go this far. At best, plaintiffs upon the proof offered by them, we submit, could recover no more than the pro rata interest presumably in the community as shown by the deed to their father. And in this instance, that interest was $500, or an undivided one-thirtieth of the entire property, or an undivided one-sixtieth recoverable by the heirs.

Defendants undertook to show and should have been permitted to show that even the $500 was never paid by the community; that the sale to plaintiffs' father was a simulation; that it was simply the placing of the property in his name in trust for Knight and Lovett for the purpose of giving him the widest latitude of agency, as described in Griffith *vs.* Alcocke, 37 S. Rep., 47, decided by the Supreme Court of Louisiana in 1904. They offered evidence competent for that purpose, but it was rejected by the court, and we submit in this the court committed reversible error.

Defendants further offered competent testimony to show that even if the property in controversy was the community property of W. J. Knight and his wife, still it was sold by W. J. Knight for the purpose of paying community debts, and not only community debts, but a community debt against the particular land sold, and that the proceeds of the sale actually went in payment of that indebtedness. Why this testimony was rejected by the court, under the authorities cited and under the law as we take it to be, we do not know, but it was certainly admissible for the purpose offered, and in rejecting it we submit the court committed reversible error.

The ten years prescription plead by defendants was ignored by the court as well as all of the other defenses offered. We submit the evidence in the case demanded that the plea of prescription be submitted to the jury.

We submit that on account of the errors pointed out, the judgment of the lower court should be reversed and either here rendered in favor of plaintiffs in error, or remanded for another trial.

Respectfully submitted. **A. P. PUJO.**

HOLLAND & HOLLAND,
Attorneys for Plaintiffs in Error,
Lutcher & Moore Lumber Co. et al.

Supreme Court of United States.

NO. 101. OCTOBER TERM 1909.

DOCKET NO. 21,068.

LUTCHER & MOORE LUMBER CO., ET AL

VS.

WILLIAM H. KNIGHT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS PLAINTIFFS IN THE SUIT.

——SYLLABUS——

In the absence of stipulation to the contrary, marriage in Louisiana produces a community of acquets and gains between husband and wife.

All property acquired during the marriage in the name of either spouse is presumed to belong to the community.

On the dissolution of the community by the death of the wife, her undivided half of the community property is inherited by her heirs.

A sale of such property by the surviving husband after the death of the wife, conveys title only to his undivided half of the property, and his vendee becomes co-owner thereof in indivision with the wife's heirs.

While the father has the usufruct of his children's share of the community property, that right of usufruct is terminated by a subsequent marriage.

Prescription *acquirendi causa* does not run against minors, so that a suit entered by the child to recover his mother's share of the property within ten years after his majority is not prescribed.

In such a suit the condition of the community is not a subject of inquiry. While the wife's heirs inherit the community property subject to the community debts, the community cannot be liquidated nor the community debts inquired into in a suit for the property against the purchaser from the father.

While the unconditional heir is liable for his ancestor's debts, such liability can only be enforced in a proper suit against him. His property cannot be taken even for debt without judicial process.

Every transfer of real estate must be in writing, the written act of sale is full proof of the agreement contained in it against the contracting parties and their privies; its terms cannot be varied, altered or destroyed except by a counter letter or other written evidence.

Title to real estate cannot be proved by parol; nor is parol admissable to prove that the apparent vendee was not the actual purchaser but in fact the agent of others.

A judgment authorizing recovery on a written instrument necessarily involves an adjudication of its validity.

A judgment upholding a title is conclusive as to all the property covered by the title, whether involved in the first suit or not, against all parties to such suit and their privies or assigns.

A purchaser is a privy by contract to his vendee, and is bound by all the estoppels which affected his vendor, and is entitled to all advantages enjoyed by his vendor, of whom he is only the successor by particular title, and from whom he could acquire no better title than he himself possessed.

A party cannot controvert the title of one under whom he claims; and if the proceedings or evidence in a suit show that both parties trace their titles to a common source, neither can attack the title of their common author.

The judgment of a court of competent jurisdiction will be respected and be given effect by all other courts.

The law of the state where the land is situated governs in all questions of title thereto, and no contrary law or rule elsewhere has any weight.

STATEMENT

This is a suit instituted by plaintiffs (the respondents here) to recover from defendants (plaintiffs here) an undivided half interest in two thousand and eighty-three acres of land situated in the parish of Vernon, State of Louisiana, in-

herited from their mother, Mary Cain Knight, and improperly sold by their father, W. J. Knight.

W. J. Knight and Mary Cain married in July 1875, and the wife died in 1885, leaving four children, who are the plaintiffs in this case. On July 28th, 1882 D. R. Knight and J. A. Lovett sold to W. J Knight the 2,083 acres of land here involved, together with a large saw mill and appurtenances, wagons, teams, lumber, timber, logs and the stock of merchandise in a store. This land belonged to the community and the title thereto was in the name of the husband, W. J. Knight at the time of the dissolution of the community by the death of the wife.

In 1886 W. J. Knight married a second time and by the said second marriage his right of usufruct of his children's property was terminated under the law of Louisiana. In 1887 W. J. Knight sold an undivided half interest in this land to Viola Knight, wife of D. R. Knight and an undivided one-fourth interest therein to J. C. Knight; in 1889 W. J. Knight, J. C. Knight, and Viola Knight through D. R. Knight, agent, joined in one act, sold the whole of this land to H. J. Lutcher and G. B. Moore, and afterwards Moore sold his interest to the Lutcher & Moore Lumber Company. This suit was instituted in March, 1903, when the oldest child was about twenty-seven years old, and therefore before the ten years' prescription accrued.

The suit was brought by plaintiffs as heirs of their mother, claiming one-half of the land as her community interest therein, on the face of the title and on the law of the State under which property acquired during marriage belongs to the community between husband and wife; that she owned the undivided half of all property in the name of either spouse at the termination of the community by her death, of which her heirs become immediately the owners,

and which the surviving husband and father had no power to sell.

The suit was originally instituted in the State Court in the Parish of Vernon, and removed to the United States Circuit Court of the western district of Louisiana on the petition of the defendants, where, on the first trial plaintiffs suit was dismissed. On appeal to the Circuit Court of Appeals of the Fifth Circuit, that judgment was reversed and the case remanded to be returned to the State Court, on the ground that the petition for removal was insufficient. Instead of returning the case to the State Court, the defendants were allowed to amend their petition for removal and jurisdiction retained by the Circuit Court, all over the objection of plaintiffs who took a bill of exceptions to the action of the Court.

The first answer filed by defendants appearing in the record appears on p. 7, and why counsel calls it "their first amended original answer in lieu of their original answer heretofore filed," the writer doesn't know. But that answer set up the plea of no cause of action, a general denial, a special denial that W. J. Knight married plaintiffs' mother or that they were lawful heirs of any previous marriage, an averrment that plaintiffs claim that they were heirs of W. J. Knight's first wife and the property sued for constitutes part of the community of Knight and his first wife is without foundation in fact and in law. An allegation that the property sued for was the separate property of W. J. Knight, being a gift to him from D. R. Knight and J. A. Lovett; an allegation that neither the community nor Knight paid any consideration for the property; that the cash portion of the price recited in the act was not paid and the note for the credit part of the price was never executed and never had any existence; and that the property was a gift to W.

J. Knight and was his separate property.

In contradiction of all these allegations the answer proceded to allege that the title to the property was never in the name of W. J. Knight except as trustee for D. R. Knight and J. A. Lovett under the agreement that he should hold title as trustee for their benefit, W. J. Knight agreeing that he would convey said land to Knight and Lovett or their assigns whenever they requested him to do so; that said W. J. Knight paid Knight and Lovett nothing for the land, and never executed any note therefor; that afterwards, on April 13th, 1889, at the instance and request of Knight and Lovett, or of D. R. Knight, who had paid Lovett for his interest in the land, in compliance with the terms of his original agreement W. J. Knight conveyed the title to H. J. Lutcher and G. B. Moore; that said sale to Lutcher & Moore was made under the directions of Knight & Lovett or one or both of them, and they received the consideration therefor and therefore the alleged community had no interest in the said property and plaintiffs therefore acquired no interest therein through their mother; that at the time of the sale to Lutcher & Moore W. J. Knight was married to his present wife and there was no record of his previous marriage; that all sales affecting the land were duly recorded and so far as the defendants are concerned were executed in good faith and for valuable consideration, defendant having no knowledge of any previous marriage, or of the death of his alleged wife, and they had a right to rely upon the faith and verity of the public records of the parish.

Then still in contradiction of all previous allegations, the answer proceeded to allege or reiterate that the sale of July 28th. 1882 was never intended by any of the parties thereto to convey the real right or title of the property herein sued

for; that no money belonging to said W. J. Knight or the alleged community was ever paid to the vendors and no note or other obligation was ever received or paid; that the pretended sale was made by Knight & Lovett to screen the property from the pursuit of creditors; that it never became the property of W. J. Knight or the alleged community but always belonged to Knight & Lovett who never became divested of their control until April 1889, when Lutcher & Moore bought the paper title held by W. J. Knight because he was the record holder thereof, but that he, "and his alleged previous wife," and Knight and Lovett knew at the said time that the property still belonged to Knight & Lovett and that the pretended sale of July 20th, 1882 was a similation and fiction; that all the parties to the said sale were closely related and the proceeds of the sale were divided between D. R. Knight and J. A. Lovett, who advised and procured the sale to be made and reaped the benefits of the purchase price, "and that their title has been validly conveyed to these defendants."

The answer then proceeded to call in warranty G. B. Moore, W. J. Knight, John C. Knight, Viola P. Knight and Dan R. Knight.

Plaintiffs filed a demurrer, Record p. 10 & 22, to that portion of this answer "that in any way attacks the sale from Knight & Lovett to W. J. Knight of date July 28th. 1882," and asked that it be stricken from defendants' answer, 1st. because defendants tracing their title back to W. J. Knight are estopped from attacking his title received through the act of July 28th 1882 from Knight & Lovett; second. the reality and validity of said sale has already been adjudged in the suit of McIlhenny & Co. vs. D. R. Knight et als (which was Knight & Lovett), and W. J. Knight, intervenor, No. 60 in the District Court of Louisiana in and for the parish of Vernon, wherein D. R. Knight, J. A Lovett and W. J. Knight

were all parties and said sale of July 1882 was declared by the judgment in the said suit to be a real and not a simulated sale, which judgment is pleaded as *res judicata* as to said sale; third, defendants not claiming to be creditors and not relying on any deed of Knight & Lovett, show no interest nor right to attack said sale as similated or otherwise.

Defendants filed an amended answer, record II, in which it was set up that the act of sale from Knight & Lovett to W. J. Knight included all the property belonging to Knight & Lovett, both movable and immovable, and the agreement was that W. J. Knight should act as agent and manager of the business and property of Knight & Lovett, and receive a salary for his services, agreeing to convert the movable property into money and turn over the proceeds to his principals, and to reconvey the land sued for herein whenever they shall desire him to do so; that in compliance with his agreement he did convert the movable property into money and delivered the proceeds to Knight & Lovett, and during "all of said time" (not specifying what time) recognised Knight & Lovett as owners of all said property, and never at any time repudiated said agreement. That early in 1887 he offered to reconvey the lands to Knight & Lovett, and on Feb. 5th, 1887 he did convey D. R. Knight's half interest in the lands to his wife acting by his authority; that J. A. Lovett did not want his half conveyed to him but wanted to sell it and did sell it to W. J. Knight and J. C. Knight, in pursuance of which sale W. J. Knight on February 7, 1887, conveyed a fourth interest to J. C. Knight and kept title to the other fourth for himself; that the five hundred dollars recited in the sale of July 28th, 1882, to have been paid by W. J. Knight to Knight & Lovett was in fact the money of Knight & Lovett; that the note of $14,500.00 was executed by W. J. Knight

and delivered to Knight & Lovett, "but the same was never paid by W. J. Knight to Knight & Lovett or any one else, and it was never the intention of the parties that it should be paid but the said note was afterwards redelivered to W. J. Knight without his ever having paid any part of it," and therefore the recital in the act of sale was error and untrue in fact, as no part of said purchase price was ever paid and the sale to him only constituted a paper title, so the same never became the property of the community, and plaintiffs are without right or equity to any right, title or interest in said lands.

This answer further pleaded in bar of plaintiff's right to recover the prescription of one, two, four, five and ten years.

A bill of exceptions beginning at the bottom of page 67 of the Record shows that near the close of the trial, and after the rejection of the oral evidence of Dr. J. A. Lovett, defendants offered to file another amended answer, in which they adopted all of the allegations and prayers of the previously filed answers, notwithstanding the numerous contradictions and variances between them, in which for further answer to plaintiffs demand they averred in the alternative that if it be held that the sale from Knight & Lovett to W. J. Knight was a valid sale, that in that event the note of $14,500.00 representing the credit portion of the price "was paid only by the sale of the property mentioned in said act, that is to say, that the said note of fourteen thousand five hundred dollars was a valid claim against the community existing between said W. J. Knight and the mother of said plaintiffs; and the said note was paid by the proceeds of sale of the property herein contested and that the heirs of the said Mrs. Knight cannot contest the title of said property without paying their share of the community debts so paid

out of the proceeds of the sale of said property, and no suit can be maintained by them without paying one half of $14,500.00 so paid by the sale of said property, which amount inured to their benefit in the payment of the community debt for which the said plaintiffs were equally bound with the said W. J. Knight.

Plaintiffs' counsel objected to the filing of this amended answer on the ground that it came too late, changed the issues of the defense, and was in fact a plea of want of tender which should have been filed in *limine litis*, which objections were sustained and the amended answer not allowed to be filed.

Both before and after the tender of this last amended answer defendants offered in evidence the answers of Dr. J. A. Lovett taken under commission to interrogotories propounded to him. As shown on page 60 of the record when first offered this evidence was objected to by plaintiffs' counsel on the grounds, first, "that parol evidence cannot be introduced to change, vary or prove title to real estate; second, that whatever title the defendants claim in this case is derived from W. J. Knight and they are estopped from attacking his title; third, that the defendants are not shown to be creditors of Knight & Lovett and therefore have no interest in contesting their deed to W. J. Knight; fourth, the plea of *res judicata* is binding on defendants; fifth, defendants answer does not charge fraud or error in any manner, shape or form.

To the second offering of Dr. Lovett's evidence, with the oral evidence of two witnesses offered to be placed upon the stand, see Record p. 69, plaintiffs' counsel objected upon the grounds, first, that defendants in their answer had not set up any settlement of the community between W. J. Knight and his deceased wife and should not be allowed to contest the same; second, that defendants have no right to demand

such a settlement or attack same in this collateral manner; third, that the receipted note is the best evidence of its payment; fourth, that the amendment is in the nature of a want of tender, comes too late, and is inconsistent with the original and changes the issue, and should not be allowed after the case has gone to trial. Plaintiffs' objections were sustained and the evidence excluded.

Defendants took a bill of exceptions, Record 70, to the refusal of the judge to charge the jury that the plea of prescription should be sustained, if they found the defendant had held title for more than ten years in good faith, unless the evidence has shown some fact that would prevent the running of the prescription against the plaintiffs.

Defendants took another bill of exceptions, page 71, to the refusal of the judge to charge the jury that in order for the plaintiffs to recover it was necessary for them to show that the community between their father and mother had been liquidated by the payment of its debts, and until they do so they cannot recover any interest in any specific piece of property.

On the trial the jury found a verdict in favor of the plaintiffs, Record p. 57, and judgment was rendered thereon in favor of plaintiffs, recognizing them as owners of the undivided one-half interest in the land involved. The judgment, Record 58, shows that an error in printing the record in Circuit Court of Appeals has been continued in the record in this court by which John A. Lovett, instead of John A. Knight, appears to be named as one of the plaintiffs in whose favor the judgment was rendered.

In their motion for new trial defendants specify as error the refusal of the court to allow them to file in evidence the depositions of Dr. J. A. Lovett to show the truth of the allegations in their answers and to show that the note given for

the credit portion of the price in the sale of July 28th, 1882 was paid by the sale of the land in question, and in refusing to allow them to prove same by T. J Word; in refusing permission to defendants to file their third amended and supplemental answer; in refusing to charge the jury as requested as shown by bills 4 and 5; in failing to charge the jury in regard to any phase of the law of the case, not covered by any bill.

The defendants carried the case to the Circuit Court of Appeals of the Fifth Circuit on writ of error, in which court the errors assigned covered the same grounds a little more profusely stated. After hearing arguments and considering the case the judgment of the Circuit Court was affirmed: and after failure to obtain a rehearing application was made to this Court to have the case brought up on writ of certiorari, and it was so ordered.

In their application for rehearing to the Court of Appeals, as well as for certiorari to this Court, counsel complain with great pathos that the Court of Appeals were of the opinion that all the defenses set up by them were matters of equity not cognizable by a Court of law, but that the Circuit Court was of a different opinion as shown by its sustaining the demurrer and dismissing their bill in chancery.

It seems that the learned counsel for defendants were of the same opinion as the Court of Appeals and filed a bill in chancery stating all the pleas urged here and asking for an injunction against this suit until that bill could be heard

A demurrer to that bill was filed and sustained by the Court and the bill dismissed. Of course defendants had a remedy by appeal from that judgment dismissing their bill, and we cannot see what place it has in the record in this suit, as counsel surely do not expect any errors complained of in that proceeding to be corrected in this.

Through all of defendants' shifting of position, change of issues, and contradictory allegations, their contention raised through all the pleadings and the evidence offered is that the act of sale of July 28th, 1882 is not true, does not present nor contain the true agreement between the parties; that it was never the intention of the parties to make a real sale, but that, to shield their property from the pursuit of their creditors, Knight & Lovett put their property in the name of W. J. Knight, not as owner, but as their agent to sell it and turn the proceeds over to them. This question had been presented to the Courts and settled just after the transaction was made, when all the parties were alive and present and all the facts fresh in their memories. The creditors of Knight & Lovett attached the movable property covered and conveyed by the same title as the land; W. J. Knight intervened in those suits and set up his ownership under this title; and the judgments of the Court in the various attachment suits recognized and maintained W. J. Knight's title and adjudged that the title of July 1882 was real and not simulated. See Record pp. 39 to 57.

All this seems inconsistent with and destructive of the alternative allegation in their amended answer last offered and rejected during the trial that, if their main contention be not correct, then that the note for $14,500.00 was given for the credit portion of the purchase price of community property, was a community debt, was paid after the dissolution of the community in the sale of the property, and plaintiffs must pay half the amount before they can recover their half of the property. Outside of the settled jurisprudence of this state that the settlement of the community and the payment of the community debts is not a condition precedent to the heir's right of recovery, this contention is inconsistent with defendants' repeated allegations, by which they are

bound, that all the movable property covered by the sale of July 1882 had been disposed of by W. J. Knight and the proceeds paid to Knight & Lovett which, if true, must have largely extinguished that note.

Besides, it seems ludicrous for defendants to contend that by paying $2,083.00 for 2083 acres of land, now worth ten or twenty times that amount, they paid a note of $14,500.00. Besides, they do not say they paid the note, or that it was paid through the sale to them, yet they claim that half the amount of the note must be paid to them before plaintiffs can recover their property. They stand in the position of holding plaintiffs', property taken from them without any process of law, and contending that they must get, not half what they paid, but half of a community debt, a note many fold greater than the price they paid, before the property can be recovered by the legal owner. Suppose plaintiffs are liable for half the community debts, legal liability can be enforced only by a proper suit between the party entitled to recover, who must establish his claim according to law, and the person sought to be held liable, whose property can be taken only after judgment and through proper process to execute it.

AUTHORITIES AND ARGUMENT

C. C. 2399. Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

C. C. 2402. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although

the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

C. C. 2405. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

C. C. 2406. "The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage."

After dissolution of community husband can sell only his undivided interest in the property, and vendee becomes coproprietor with wife's succession. 29 A. 663. Bonnett vs. Fuller; 32 A. 852, Tugwell vs. Tugwell; 33 A. 585, Glasscock vs. Clark; 34 A. 1026, Meyers vs. Eaton; 39 A. 786, Heirs of Murphy vs. Jury & Gillis; 2334 C. C.

The wife or her heirs may sue for her share in the community before it has been liquidated. 39 A. 785, Heirs of Murphy vs. Jury & Gillis.

And without alleging that it is solvent. 33 A. 584, Glasscock vs. Clark.

The rights of parties being fixed at the moment of dissolution of the community. 32 A. 848, Tugwell vs. Tugwell; 39 A. 785, Heirs of Murphy vs. Jury & Gillis; 42 A. 411, Succession of Dumestre; 2. R. 378, Hart vs. Foley; 48 A. 677, Verrier vs. Lorrio.

C. C. 3522. Minors and persons under interdiction cannot be prescribed against, except in the cases provided by law.

"Property acquired during a marriage in the name of the husband is presumed to belong to the community. Nor will such presumption be rebutted by proof that he acquired it with the money of his children by a former marriage; nor will such fact affect the title of the community to the property, though it may create a debt against it."

"The heirs of the wife become vested with a title to her share of the community property at the moment of her death; and, though they receive it subject to the payment of the community debts, they are not bound to await a liquidation of the community before resorting to an action to recover it. Tugwell vs. Tugwell, 32 A. 848, and Glasscock vs. Clark, 33 A. 584, reaffirmed. Nor in such action, petitory in its character, is the indebtedness of the community or its financial condition when dissolved a legitimate subject of inquiry." 39 A. 785, Heirs of Ory Murphy vs. Jury & Gillis, J. P. Murphy, warrantor.

"Upon the death of the wife, an undived half interest in the property of the community vests in her heirs, and a subsequent sale by the surviving husband, though purporting to convey the whole property, in reality conveys only the undivided interest of the husband, and constitutes the vendee an owner in indivision with the heirs of the wife, who are not bound to await the liquidation of the community for the bringing of an action to recover their interest. Nor, in such action, is the indebtedness of the community, or its financal condition, when dissolved, a legitimate subject of inquiry."

"2. A minor is not estopped to sue for the recovery of property inherited from her mother, and illegally sold by her father, because of the payment of the price to the administrator of her father's successien, or of the payment of the same by her father's administrator to her grandfather, who has not qualified as her tutor, and is not shown to have

used the money for her benefit, or by reason of the fact that part of such price has been paid to her after her majority, when it does not appear that she was informed of the source whence it came."

"3. The prescription of 10 years, *acquirendi causa*, does not run against minors." 111 La. 760, George et al. vs. Delaney.

On the subject of the heir's right to sue for property the Court cites: Bennet vs. Fuller, 29 La. Ann, 663; Tugwell vs. Tugwell, 32 La. Ann. 848; Glasscock et al vs. Clark, 33 La. Ann. 584; Ogden et al. vs. University, 49 La. Ann, 191; 21 South. 685; 33 La. Ann. 744.

On the subject of prescription in the body of the decision the Court says: "It is also clear that the plea of prescription is not well founded, since the elder of the plaintiffs attained her majority only in 1896, and this action was brought in 1902; and the prescription, *acquirendi causa*, does not run against minors. Civ. Code, Art. 3522; Barrow vs. Wilson, 38 La. Ann. 209; Messick vs. Mayer, 52 La. Ann. 1161, 27 South, 815."

32 A. 848. "When the community of acquets and gains is dissolved by the death of the wife, the respective interests of the surviving husband and of the deceased wife attach, *at the moment of its dissolution*, to the property of the community, subject to the payment of the community debts. This right will be recognized if sued for in the proper action, and may be enforced at any time, when demanded by a partiton of the property or otherwise." * * *

In the body of the decision, after quoting C. C. 2405 and 2406, the Court says: "The construction of this last article, although seemingly so plain in its terms. and the nature of the interest of the surviving wife or her heirs in a community dissolved by her death, and the rights of action growing out

of it, have been the subject of many and conflicting decisions by the Courts of the State, and the jurisprudence on this point is somewhat unsettled.

"In the case of German vs. Gay et al. 9 A. 582, the identical question here presented came up for ajudication. The Court in that case says: 'The plaintiff as heir-at-law of Nancy Frier, late wife of R. Nichols, and in community with him, sues the defendant for one-half of a slave which belonged to the community. The question presented by the exception is whether the heir of the wife has a right to recover the undivided half without alleging that a partition has been made, and *the community settled.*'

"The Court held that the action would lie, and further says:

'It cannot be doubted that the community terminated by the death of one of the parties; if the husband survives, he has no longer a right to sell the whole property. The heirs of the wife may renounce or accept the community; if they accept either tacitly or expressly, they become joint owners with the surviving husband; and if the husband sells he can convey no greater right than he has himself, and his vendee becomes the co-proprietor with the heirs of the wife. * * * According to our understanding of the Code, the distinct interest of the parties attaches at the dissolution of the marriage, subject, however, to the right of the wife or her heirs, as the case may be, to renounce, and thereby exonerate herself from the payment of the debts of the community. * * * The District Judge is of opinion that a distinct interest does not vest in the wife or her heirs before a settlement or liquidation of the community; but if this were so it would be difficult to reconcile that part of the Code which authorizes the heirs of the wife, or herself, if she survives, to attack alienations made by the husband, even dur-

ing marriage, which had been made in fraud of her rights. If her eventual right depended altogether on a settlement to be had of the community, she would be without any right of which she could be defrauded.

The pretentions of the surviving husband rest upon the supposition that he has in law a right to settle and liquidate the community, and that the rights of the wife depend upon such settlement and liquidation, which must be done with him and him alone. His authority as master of the community ceases on the dissolution of the marriage. The right of the heirs of the deceased party then attaches to have a partition of the effects subject to the payment of the debts.

"The opinion in this case, from which we have just quoted, but reasserts the principles enunciated in the case of Broussard vs. Bernard, 7 L. 222, and they have been followed by a long line of decisions which re-affirm the same doctrine. See 12 R. 266; 3 A. 562; 5 A. 581, 582; 16 A. 49; 18A. 409; 19 A. 428.

"In the case of Bennett vs. Fuller, 29 A. 733, the various decisions on this subject were reviewed by our immediate predecessors; and after referring to the conflict in the decisions, and thoroughly discussing the same, they quote from the earlier decisions which we have cited, and expressly sanction and approve the doctrine which they enunciate. We, too, concur in their conclusions.

"To give the article of the Code referred to a different construction or the construction warranted by some of the decisions of this Court, a number of which has been cited by counsel for defendant, would be in a great measure to destroy the force of the article, and almost to deny any right under it whatever to the surviving wife or her heirs; or if any right is recognized, it is so undefined, and its exercise clogged with so many conditions as to render it virtually impracticable.

"To set at rest this vexed question, we distinctly announce that, construing the articles of the Code upon this subject in accordance with what we conceive to be their plain and express language, we hold that when the community of acquets and gains is dissolved by the death of the wife, the respective interests of the surviving husband and of the deceased wife attach at the moment of its dissolution to the property of the community, subject to the payment of the community debts. This right will be recognized when demanded in the proper action, and may be enforced at any time when demanded by a partition of the property or otherwise. * * *.

"The title to one-half of the Community property is vested in the heirs of the deceased wife at the moment of her death, and it is not necessary for them, when they claim it, to allege that the community is liquidated and solvent. Decisions in 25 An. 379, and 26 A. 639, overruled. Decision in 32 An. 848, affirmed." 33 A. 584. Glasscock et al vs. Clark.

In the body of the decision the Court says: "The plaintiffs, as heirs of their mother, sue to be decreed the owners of an undivided interest of certain real estate acquired during the community between her and her husband, and which the latter assumed of his own authority to sell, as a unit, after her death.

"The defendant filed a peremptory exception of no cause of action, which was sustained, and the suit was consequently dismissed.

"We are left to infer, from the brief filed on behalf of the plaintiffs, that the judge of the lower Court considered that the plaintiffs could have no right of action unless upon allegation of the liquidation and solvency of the community, as was announced in 25 An. 379, and 26 An. 639.

"The exception was not well founded, and the judgment

sustaining it is erroneous.

"At the death of plaintiffs' mother, the effects which composed the partnership of gains were divided into two equal portions between them, in their mother's right, and their father in his own; R. C. C. 2406; Domat, v. 2, p. 32, No. 2470; and the rights so acquired vested so effectually in the plaintiffs, that the surviving partner could not legally alienate or encumber the property so as to affect them. 23 An. 638; 15 An. 113.

"The heirs being considered seized of the succession from the moment of its being opened, the right of possession which the deceased would have had, if the community had been dissolved by judgment, vested and continued in the person of the heirs, and each heir became an undivided proprietor of the effects of their mother's succession, for the part or portion coming to him, which formed among them a community of property, as long as it remained undivided; R. C. C. 936, 1214; so much so, that a judicial mortgage can be acquired by registry, against an heir, affecting all the mortgageable property thus acquired and owned by him. 21 An. 253; 27 An. 504; 31 An. 748; Brennan vs. Bernard; 7L. 222; see, also, 7 N. S. 94; 9 L. 284; 12 R. 266; 1 R. 149, 378; 10 R. 18; 3 An. 562.

"This doctrine was fully sustained in Bennett vs. Fuller, 29 An. 663, in which it was held, that, after the dissolution of the community, the husband, as its former head, has no power to sell and can convey title to no greater part of the community property than his undivided half interest in it. See 31 An. 498.

"In Tugwell vs. Tugwell, decided by the present court, 32 An. 859, we distinctly held that the interest of the deceased spouse attaches at the moment of the dissolution of the community to the property of the same, subject to the

payment of the community debts, and that for the enforcement of the rights so acquired by the heirs it is not necessary that they should have been recognized or the community liquidated previously.

"By instituting the suit, in the right of their mother, the plaintiffs have accepted her succession and, consequently, the community which existed between her and their father.

"In the Tugwell case, the principle announced in Gennan vs. Gay, 9 L. 582, which is decisive of the question here presented, was distinctly affirmed, the Court making a copious extract from the opinion delivered at the time.

"See, also, 5 An. 581, 582; 6 A. 295; 16 A. 49; 18 A. 409; 19 An. 428; 7 R. 183; 5 R. 9; 2 L. 300; 12 R. 258.

"We also there held, that an heir can sue for his share in a succession without being constrained to make his co-heirs parties. 5 L. 430; 4 O. S. 472; 3 L. 134, 32 An. 949.

"The rulings on the points now before us, as found in 25 A. 379; 26 A. 639; 27 A. 634, may well now be treated as no longer authority."

On the application for rehearing the Court said: "The oral argument of his counsel, which had been listened to with earnest attention and interest, had not escaped our recollection, but fell short of the intended effect, which was to induce us to review two decisions which had been considered as erroneous by our immediate predecessors (in 29 An. 663,) whose conclusions had been reaffirmed by ourselves in Tugwell vs. Tugwell, 32 A. 849; and which decisions we then considered, and now declare, to be formally and finally overruled. We refer to the cases of Phelan vs. Ax, 25 An. 379, and Daniel vs. Ivy, 26 An. 639."

"A deed which purports to convey a greater estate than the grantor has will be void only as to the excess, and will be construed as a conveyance of that which it was in his power

to convey. And where the interest of a tennant in common in land is conveyed by a deed which purports to convey the entire interest therein, and a subsequent conveyance by metes and bounds of portions of such tract is made by the grantee to others by deeds purporting to convey the entire interest, it is decided that the latter will take proportionate shares of the individual interest of the original tenant in common." 13 Cyc. p. 657 & 8 (1)

After the dissolution of the community by the death of the wife, the husband, as its former head, has no power to convey title to any greater part of community property than his undivided part thereof, and his vendee becomes simply a co-proprietor with the heirs or succession of the wife. 34 A. 1026, Meyers vs. Brigham, affirming Bennett vs. Fuller, 29 An. 663; affirming Tugwell vs. Tugwell, 32 An. 848; affirming Glasscock vs. Clarke 33 An. 584. All these cases are cited with approval in Landreaux vs. Lonque, 43 A. 239, and George vs. Delaney, 111 La. 760.

"Property acquired during a marriage in the name of the husband is presumed to belong to the community. Nor will such a presumption be rebutted by proof that he acquired the property with the money of his children by a former marriage; nor will such fact affect the title of the community to the property, though it may create a debt against it.

"The heirs of the wife become vested with a title to her share of the community property at the moment of her death; and though they receive it subject to the payment of the community debts, they are not bound to await a liquidation of the community before resorting to an action to recover it. Tugwell vs. Tugwell, 32 A. 848, and Glasscock vs. Clark, 33 A. 584, reaffirmed. Nor in such action, petitory in its character, is the indebtedness of the community or its financial

condition when dissolved, a legitimate subject of enquiry." 39 A. 785, Heirs of Murphy vs. Jurey & Gillis, J. P. Murphy, warrantor.

This was a suit to recover plaintiffs' interest in certain property as heirs of their deceased mother by reason of her community interest.

The property had been treated as the husband's separate property, because, although acquired during the marriage, it had been paid for with money belonging to the husband and his children by a preceding marriage. After the second wife's death he remained in possession of the property until he died, there having been no settlement of the community and no administration of his wife's succession. After the husband's death there was a partition of his estate and this piece of property fell to a son by the first marriage, who sold it to the defendants and was called in warranty. The Court proceeds to say:

"It is shown that these lands were all acquired during the existence of the community between J. J. Murphy and his wife, Ory Murphy, and are therefore presumed to be community property. C. C. 2405.

"Upon the dissolution of the community by the death of the wife, the title to her share of the community property, the one undivided half of the same, vested in her heirs. C. C. 3406; Tugwell vs. Tugwell, 32 A. 848.

"And though the heirs received the property subject to the community debts, it is now settled that their action for it may be maintained without allegation or proof of the liquidation or solvency of the community. 1b. and Glasscock vs. Clark. 33 A. 584. And it is enough to say in this case, as in the case cited above, that the creditors of the community, if there are any, are not before us seeking to enforce their claims against the community. Nor would any such inquiry

be permissible in an action of this kind, which is petitory in its character, and the right of the plaintiffs acquired at the instant of the death of the person from whom they inherited. The communitv creditors, if there were any, might have subjected this property by proper proceedings to the payment of their debts and thus divested the plaintiffs of their title to the property, but it has not been done and cannot be done in this form of action, nor by the parties to the present controversy. All evidence respecting claims against, the community and its condition at the moment of its dissolution should therefore have been rejected.

"There is a plea of prescription of ten and thirty years urged against the plaintiffs' right of action which, was over ruled by the lower court and properly so.

"Ten years had not expired between the date of the conveyance of the property from J. P. Murphv to the defendants. J. P. Murphy claimed tne property by inheritance from his father, J. J. Murphy, and as the father had not the vestige of title to the property, he transmitted none to his heirs. They took it *cum vitiis*. There was no basis for the prescriptiom urged in favor of J. P. Murphy.

"There is an amendment of the judgment of the lower court prayed for as to that part of it which rejects plaintiffs' claims to certain designated portions of land.

"The amendment must be allowed:

"The defendants in their answer admit the possession of all the land claimed and described in the petition.

"J. J. Murphy was in possession of it at the dissolution of the community, it was a matter of no moment whether a part of this land was acquired by a military warrant or bv money, so that it was acquired during the marriage. This and other portions excepted or declared free from plaintiffs' claims, purports to have been acquired by J. P. Murphy by

inheritance from J. J. Murphy and partition. They, defendants, claim solely through their purchase from J. P. Murphy. J. J. Murphy was the author of both warrantor's and defendants' titles, and nothing is better settled than that parties cannot dispute their author's title."

It is clear that under the law and jurisprudence of this state the property sued for legally and rightfully belongs to plaintiffs, that prescription did not run against them while minors; and that they instituted their suit less than ten years after their majority, so that defendant's plea of prescription is not good, and the learned Circuit Jugde was correct in refusing the requested charge regarding ten years' prescription, as the evidence clearly shows "some fact that would prevent the running of prescription against the plaintiffs," quoting from the requested charge (Record 70). Children born of a marriage contracted in July 1875, against whom prescription could not run during minority, could not have been prescribed against in March 1903 when this suit was brought, and when the oldest child was not over 27 years old.

It is also apparent from the foregoing citations of authority that plaintiffs have a right to prosecute this suit without showing a liquidation of the community and the payment of its debts. The law is not so unjust as to require infants to look after the settlement of estates and the payment of debts. It is sufficient for them to show their property held by another, and the defendant cannot legally hold it unless he shows that the heirs' title has been divested and transferred to him by due process of law. A man's property, much less a child's, cannot be sold and held without legal process, merely because he is in debt. If there are any community debts for which plaintiffs are liable in part there is an orderly manner provided by law for the enforcement of their liability—

and not by taking their property witnout a hearing. If the community should be settled and liquidated, it should be gone about in an orderly manner. Defendants are not charged with the duty nor clothed with the power of looking after the liquidation of the community, nor to the payment of their debts by plaintiffs, who have made themselves liable for their mother's half of any community debts that may exist. Defendants have disclosed no legitimate interest in these questions, and no such objects can be accomplished in this form of action. Indeed, defendants did not profess to know, and made no effort to show, the true condition of the community, and it could not be done in this suit, even if they knew all about it. Therefore the Court did not err in refusing the charge requested, to the effect that plaintiffs could not prosecute the suit without first showing the liquidation of the community and payment of its debts (Record 71).

Defendants claim or assume to have acted in good faith, yet, while good faith is always presumed, we have serious doubts of the quality and quantity of their good faith. It seems probable that they bought the land without investigating the title; that the price they paid was so insignificant and the timber so fine that they just chanced the title—possibly knew the defects and risked it anyway. Of course, if a party or his counsel persist in ignoring the law of the State that governs, and get into trouble by that alone, we cannot see how he has really acted in good faith or why he should be entitled to sympathy or be so loud in his cries for equity. If a party makes an important purchase without having the title examined, he is guilty of such laches as to deprive him of all equitable consideration—particularly when he buys such valuable property for so little. It amounts to no examination, if, ignorant of the law, he makes the examination himself, or if he employs counsel not familiar with the law

where the property is situated.

No Louisiana lawyer would approve a title without inquiry into the marital status of the seller, as well as of previous owners; and as defendants bought from three persons familliar with the facts, they must have learned them also, or were guilty of gross laches in not making inquiry, or in not employing a lawyer to examine the title who would have known or would have ascertained the facts before approving the title.

So, defendants' troubles in this case in no manner justify their loud cries for equity and for the privilege of disregarding the law of the State. The general course of the defense would indicate that it was shaped by counsel who had thought it unnecessary to follow the law of this State, although it is elementary that titles to real estate, as well as proof thereof, and evidence relative thereto, are governed by the law of the State in which it is situated. We find no great difference in the main principles of law here involved between the laws of this and other States or in the jurisprudence of this and the State courts; but so far we have seen no authority cited by defendants except such as we can and will hearinafter show has no application, because based upon some local statute or some rule contrary to the law of Louisiana.

In 141 U. S. 87, Carpenter vs. Strange, this court held that the New York Courts "had no power to decree that a deed of land in Tennessee was null and void." In other words, titles to real estate are governed exclusively by the laws of the State in which it is situated. On p. 106 this Court said: "To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res* * *

Direct action upon the real estate was certainly not within the power of the Court, and as it did not order Mrs. Strange to take any action with reference to it, and she took none, the Courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its Courts"—citing several authorities.

Louisiana Civil Code, and not the general commercial law, governs the contract of sale made and executed there, Buckley vs. Hanold, 19 How. 393.

The title to land can be acquired and lost only in the manner prescribed by the law of the place where the land is situated. U. S. vs. Crosby, 7 Cr. 146; Clark vs. Graham, 6 Wheat. 579; Kerr vs. Moon, 9 Wheat. 570; McCormick vs. Sullivan, 10Wheat. 201.

Remedies in respect to real property are according to *lex loci rei sitae*. Robinson vs. Campbell, 3 Wheat. 219.

Real estate is governed by the law of its *situs*. Carpenter vs. Strange, 145 U. S. 105.

"The law of the place in which the land is situated governs the transfer of the land." 13 Cyc. p. 526 B.

"The law of the State where the land is situated governs the construction of a deed." 13 Cyc. p. 600, A. 1.

The foregoing appears ample to justify us in asking this Court to follow the law of Louisiana in this case wherever there is any difference between its laws and rules regarding titles to real estate and proof relative thereto and such laws and rules prevailing in other jurisdictions.

The learned counsel who prepared the supplemental brief on the application for certiorari, only because, as he says, he thought it proper to correct an error in the position assumed by the leading counsel in the case relative to title to community property in Louisiana, thus acknowledging

the controlling force of the laws of this State, appears to have been also unable to find any Louisiana law to sustain his contention. Ignoring the provisions of our Code making written contracts, and particularly sales of real estate, conclusive between parties and privies, also those provisions requiring sales of real estate to be in writing, and numerous decisions constituting the settled jurisprudence of this State that parol evidence is not admissible to prove, alter, or vary titles to real estate, to prove agency to buy real estate, to prove that the apparent vendee was not the real vendee but an agent or trustee, he cites only one authority, a decision of this honorable court in Smithsonian Institution vs. Meech, 169 U. S. 398, rendered under a local statute prevailing in the District of Columbia, but having no force in Louisiana.

In that case this Court held, as shown by the first paragraph of the sylabus: "In the District of Columbia it is the rule that when, upon a purchase of real estate, the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust arises, which may be shown by parol proof; and the grantee in the conveyance will be held, on such evidence, as trustee for the party from whom the consideration proceeds, whose rights will be enforced as against those claiming under the record title."

It is true that the Court cites other authority to the same effect. But the law of Louisiana is very different. In Louisiana the furnishing of money to make payments on the price, either in whole or in part, does not create a trust or give title to the person furnishing the money. In Westmore vs. Harz, 111 La. 305, the heirs of the deceased husband sued the surviving wife and sought to be recognized as owners of the property, on the ground that the property had been bought and paid for by their father, although the title had

been put in his wife's name. To make this case still stronger than that cited from 169 U. S., this suit involved one piece of property bought before marriage, and while the vendee was the mistress of the plaintiffs father. No such conditions as are stated in 169 U. S. could arise in Louisiana, because property acquired in the name of either spouse, or in those of both, would belong to the community. But the Court held that the property acquired in the name of the vendee before marriage belonged to her and not to her subsequent husband who furnished the money. There were two suits brought by the heirs of the father, one regarding the property bought after marriage in the name of the wife, which, of course, was held to be community property. Regarding the other case the Court said:

"Where the only parties to an act of sale of real property are the vendor and the vendee, the ownership of the property passed to the vendee. The children of a third person cannot by means of parol evidence have the property taken from the vendee and vested in their father on the ground that the act evidenced a disguised donation by him to the vendee, as he had furnished her the money with which the propeaty was bought. The donation to her of the money might be subject to attack, but the ownership in the property would stand."

The Court proceeds: "Plaintiffs claim this property on the ground that the property was bought with the funds of the father, that he continued from the date of the purchase in its occupation and control, that the purchase was in fraud of their rights, and that she was the concubine of their father.

"The testimony shows that these parties lived in concubinange, and we think it also proves that the price was paid by Westmore.

" * * * We do not think that plaintiffs are entitled to a judgment decreeing the property conveyed in the act before DeArmas, notary, to Louisa Harz, to have belonged to their father. The only parties to that act were Devereaux, the vendor, and Louisa Harz, the vendee. Westmore nowhere appears in it. The contract which was created by that act was unquestionably a real one. Devereaux intended to sell, and Miss Harz to buy the property. She was of full age, and under no legal incapacity. It is claimed that at the moment the act of sale was executed she was Westmore's mistress, but the precise date at which her relations with him as such commenced is not known. Assuming that she was his mistress at the time, he certainly did not donate the property in question to her, for it was not his to donate to her. The property belonged to Devereaux, and was transferred directly from him to Miss Harz. Scudder vs. Howe, 44 La. An. 1103, 11 South. 824. If he donated anything to her it was not the property, but the $2,878, the money with which she made the cash payment. Todd vs. Larkin, 38 La. An. 674; Wolverton vs. Stevenson, 52 La. An. 1153, 27 South. 674. The title itself passed to her when she made that payment, and when she executed simultaneously, as she did, her own notes for the balance of the price, secured by mortgage on the property. *The title cannot be made to vest in Westmore by parol evidence.* Breaux's Digest, p. 369, No. 2; Hoffman vs. Ackerman, 35 South. 482. *The litle to the property would not be affected by who would and who would not pay the after maturing notes.* (Italics ours.)

"The only issue we have presently to decide is whether this particular property became by its purchase the property of Louisa Harz.

"We are of the opinion, and so decide, that the owner-

ship of that property vested by the purchase in Louisa Harz, and that, if the plaintiffs had or have any cause of action or right of attack against her by reason of donations made to her by their father, it is by reason of donations of money which he may have made to her. This cause of action and right of attack, if any they have, is expressly reserved to them, as is expressly reserved to defendants all rights of defense which they may have in the premises."

The above is sufficient to show that in Louisiana the purchase of property in the name of one person and the payment of the price by another creates no trust and gives the one who furnishes the money no title to the property, either in law or in equity. A debt may be due him or his heirs, but neither he nor they have any title.

The number of changes of positions and issues presented by defendants in this case is extraordinary; and, while amendments to pleadings are favored, no amendment will be allowed which changes the issues. C. P. Art. 419,420. Amendments sre not allowed pending trial changing issues and delaying suit. 30 A. 531; 1 R. 62; 20 A. 53; 4 R. 466; 2 A. 453; 10 A 542; 15 L. 196; 1 A. 372. Nor at any time when amendment changes issues. 30 A. 1099; 7 R. 274; 10 A. 178. Nor where facts sought to be alleged were known and could have been alleged in former answer. 2 A. 905. Leave of Court or consent necessary. 45 A. 333; 2 La. 220, 210; 1 R. 553; 6 A. 254. Even after being filed an amendment can be ruled out by the Court *ex proprio motu* 15 A. 694. The allowance of amendments is a matter of discretion with the Court. 1 L. 212; 9. R. 79: 27 A. 715. Discretion in allowing an amendment not lightly disturbed. 4 L. 298; 1 A. 275.

As the amended answer which the Court did not allow to be filed materially changed the issues from those presented

by the answers previously filed, as the pretended facts set up therein were as well known to the defendants through the evidence of Dr. Lovett taken orally and under commission months before, and as it contained matter amounting to a plea of want of tender, which can alone be filed *in limine litis*, the Court did not err in not allowing it to be filed.

The changes in defendants' pleadings also involved allegations contradictory to those previovsly made by them, in disregard of the well known principle that parties are conconcluded by their judicial declarations and cannot be heard to prove anything contrary to what they have solemnly alleged. Besides, the last amended answer offered was properly refused, because it sought to open questions which could not be heard and determined in this proceeding, according to the settled jurisprudence of this State for a century past, only excepting the few decisions which were overruled incidentally in many cases, and directly in the 39 A. case cited, that the liquidation or settlement of the community, the payment of its debts, and the liability of the wife or the heirs are not legitimate subjects of inquiry in petitory actions instituted to recover their share of property illegally sold by the husband. Besides, it is manifest that the fictitious allegations set up in that amended answer were mere pretexts under which defendants sought to introduce illegal evidence previously excluded and inadmissible even under the amended answer offered.

In fact and in law, the Court could not legally allow the filing of a pleading nor the introduction of illegal evidence to sustain it which necessarily and indubitably covered the object and intention to introduce evidence parties are estopped from introducing, or which might be illegal from any one.

The whole defense set up by defendants in their several answers, those filed and the one rejected, and all the evi-

dence they offered which was rejected, was intended to make proof prohibited by law. Defendants are estopped from proving or alleging any and every fact set up by them, not only by by the judgments appearing on Record pp. 45 & 46, 56 & 57, plead as *res judicata*, but also by the act of sale from Knight & Lovett to W. J. Knight. Somewhere in this record defendants' counsel have said they were not bound by those judgments and had nothing to do with them, and doubtless their position is the same with reference to the sale of July 28, 1882. All the interest which defendants have or possibly can have in the lands involved in this case was acquired under the title of July 28th, 1882. No man can be heard to question his author's title, as said in some of the authorities above cited; so that defendants have no right, either by pleading or by evidence, to dispute the title of W. J. Knight, because he is unquestionably their author. But, grant for the sake of argument that defendants are right and that they acquired their title really from Knight & Lovett, that does not alter the situation, defendants are equally bound, concluded, and estopped, because they as well as W. J. Knight were parties to the suits in which the judgments were rendered, and also to the act of sale whose validity was thereby upheld. No man can acquire a title without some author, and no man can acquire any better title than his author had. Privies are as much bound as the parties by the estoppels worked both by the judgments and the act of sale, because they are merely the successors of those parties, and a successor, whether by universal title such as inheritance, or by particular title such as a purchase, cannot acquire any better title than his author had, whose title was transmitted to him encumbered with all of its estoppels and disadvantages, as well as clothed with all its rights and advantages.

In their "Supplemental Brief in Behalf of Petitioners," on p. 4, the learned counsel for defendants say: "While we recognize the doctrine that parol evidence is not admissible for the purpose of establishing title to real estate, yet testimony of such character is admissible to show that the note representing the credit portion of the purchase price had not been canceled nor retired at the time of the death of Mrs. Knight."

This would do very well if counsel would stand by their admission that they cannot prove title to real estate by parol; and if they would institute a proper proceeding, we would have no objection to their establishing by legal evidence the true condition of the community as well as to prove that the $14,500-00 note was outstanding at the time of the death of Mrs. Knight. But, as held by numerous authorities hereinbefore cited, such proof cannot be adduced in this proceeding. If any one with a claim against the community will institute suit against the plaintiffs as heirs of their mother, they will respond, and be perfectly willing to meet any liability they have incurred by accepting her succession. But they do protest that their property cannot be withheld from them in order to coerce them to comply with exhorbitant demands, or be deprived of their property.

The following paragraph on the same page of their brief directly contradicts their admission and discloses that their object was to establish title to real estate by parol evidence, and that too by the evidence of a party to the act, bound by its recitals and estopped by two judgments upholding its validity.

The second clause on page 4 of that brief reads: "The main contention of the petitioners in this case (meaning the defendants in the suit) is that the property never belonged to W. J. Knight, but that he was merely a trustee for the

use and benefit of Knight & Lovett, who had transferred the property to him in order to avoid the pursuit of their creditors," In other words, in direct violation of the admission made above, in the second paragraph they disclose their object to be to establish title to real estate by parol, by showing that the real title remained in Knight & Lovett.

This sustains what we have already said, that, throughout all their shifting and changing, their one object is to contradict the recitals of their own act, their own as successors to the original parties, and to establish title to real estate by parol. The proceedings in two suits instituted by the creditors of Knight & Lovett filed in evidence in this suit show that soon after the sale of July 188? those creditors, acting on the theory that that sale was a fraudulent simulation, defendants' contention here, attached the movable property covered by that title: that W. J. Knight intervened, claiming to be owner under the title, and, if Dr. Lovett wanted to assert his ownership and show that the act was a simulation, then, or never, was the time to do it. The proceeding taken by the creditors was proper and legal, in which oral evidence was admissible, in which the widest latitude is permitted in adducing evidence; and in those suits, instituted just after the transaction, with all the parties present and the facts fresh in their memories, the court decided in both cases that W. J. Knight's title was good and that the sale was actual and not fictitious. That settled and concluded forever the validity of that sale as to everything it covered as against the parties and their successors or privies. We therefore cannot see how the able counsel representing the defendants can now seek to unsettle what was then finally determined. But, even without the judgments, they are concluded by the terms of the act of sale itself, because they are the successors and privies of the parties, derive all their

rights from them, and are only sued as such. Not only are they bound by the judgments plead as *res judicata* and by the act of sale, but neither they nor any otner person have any right to prove what they attempt to prove by parol. They claim the right to prove by Dr. Lovett the averments of their several answers, in one that the act was a gift and vested the lands in W. J. Knight as separate and not community property; in another that it was a simulation, no price being paid and no note executed; in another it constituted W. J. Knight the agent of Knight & Lovett, the cash payment having been made with their money and the note, although executed, immediately returned to him; in another that the note was a community debt outstanding at the dissolution of the community and afterwards paid by the sale of the land, though it is alleged numbers of times that W. J. Knight turned over to Knight and Lovett all the proceeds of the movables—necessarily in extinguishment of the note. All these questions are cognate, so that all the authorities on the various subjects, or branches of the subject, can be considered together. Infact, they are mixed to a considerable extent in numerous decisions.

It is apparent that each set of allegations is contradictory of the others and that, under the authorities herein cited none of them are legally susceptible of proof by parol in this suit.

Every transfer of real estate must be in writing. C. C. 2275.

Parol evidence is inadmissible to prove that the person whose name appears in the deed was only the agent and not the purchaser. 45 A. 580; 42 A. 449.

The authentic act is full proof of the agreement contained in it against the contracting parties. C. C. 2226; 45 A. 326.

A sale has full effect between the parties unless a coun-

ter letter is reserved. 47 A. 272; 42 A. 738.

Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them or since. C C. 2276; 51 A. 636; 109 La. 680; 107 La. 549; 49 A. 984; 45 A. 526; 42 A. 735; 40 A. 157; 27 A. 198; 26 A. 445; 23 A. 589; 12 A. 54; 4 A, 229.

Parol evidence is never admissible to prove title to real estate. 110 La. 1070 (on rehearing).

A party cannot controvert the title of one under whom he claims. 110 La. 306; 15 A. 684; 4 A. 249; 4 N. S. 402; 1 N. S. 577.

If the pleadings or evidence show that the parties trace their title to the same source, neither can attack the title of their common author. 10 A. 327; 5 A. 677; 8 La. 239; 2 La. 215; 1 R. 369.

None but forced heirs or creditors can attack a sale for fraud or simulation. 37 A. 178.

Where defendant, by written answer, admits that he holds title under plaintiff, he is precluded from disputing the plaintiffs' title. 10 A. 542.

Where a party has expressly recognized the title of another, by buying from him, he estops himself from questioning the validity of such title, and a party holding under him, as vendee, must be held to a recognition of that title. 15 A. 684; 34 A. 632.

A party cannot vary or destroy his voluntary written agreements with other than written evidence. 5 A. 315; 11 A. 113; 12 A. 1239; 17 A. 2; 22 A, 382; 35 A. 505; 40 A. 336.

The only exception to this rule is that either party may propound interrogatories to the other, whose written answers are admissible, but they are conclusive, and cannot be contradicted or questioned by the other party. 35 A. 1052;

26 A. 252, 693; 10 A, 705, 706.

"In a suit brought against the widow and heirs of a deceased person for the recovery of real property, standing in his name at his death, on the theory that the deceased was agent of the plaintiff to buy real estate, it is held that parol is inadmissible even to prove fraud in taking the property in his name for the purpose of establishing title in the plaintiff." 42 A. 618; 5 A. 132; 12 A. 213; 15 A. 540; 40 A. 157; 49 A. 984; 116 La. 952, Barrow vs. Grant.

A sale by authentic act has full effect between the parties unless a counter letter is reserved. 47 A. 272.

As the contract of sale must be in writing; necessarily the authority or power to execute that contract must also be in writing. 16 A. 160; 34 A. 231.

Parol evidence is inadmissible to prove that the person whose name appears in the deed was only an agent and not the purchaser. 5 A. 132; 12 A. 213; 15 A 539; 32 A. 635; 45 A. 580; 42 A. 618, 449.

See Hoffman vs. Ackerman. 110 La. 1070 (on rehearing).

In 42 A. 738, this Court said: "It is Hornbook law in our jurisprudence that the validity and reality of authentic acts of sale can be assailed by the parties only in two ways, viz: First, by means of a counter letter; second, by the answers of the other party to interrogatories on facts and articles. Citing 11 A. 418; 9 R. 376; 12 R. 215; 10 A. 704; 27 A. 266; 36 A. 100; 38 A. 54; 6 N. S. 206; 4 La. 1, 169, 351; 3 R. 441; 6 R. 443; 8 R. 102; 11 R. 270; 3 A. 153; 4 A. 487.

A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties and their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the

same parties, or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. 168 U. S. 1; S. P. R. R. Co vs. U. S.

The decisions in 146 U. S 570 and 615 were held to be *res judicata* of the question presented in 168 U. S. 1, because the lands sought in the last case, although different lands, were in the same category as those involved in the 146 U. S. cases. Here the plea is still stronger because the lands here involved were conveyed by the same act as the movables involved in the suits of McIlhenny & Co. vs. D. R. Knight et al, W. J. Knight, Intervenor, No. 60, and E. S. Jemison vs. D. R. Knight et al, W. J. Knight, Intervenor, No. 58. both in District Court of Vernon parish, in both of which the sale of July 28th, 1882, was held to be a real sale, and not a simulation See judgments on pp. 45 and 46, 56 and 57 of the printed Record herein.

In 167 U. S. 371, New Orleans vs. Citizens Bank, on p. 396, this Court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear.

"Bank vs. Beverly, 1 How. 134, 139, it was held that the construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In Tioga Railroad vs. Bloss-burg & Corning Railroad, 20 Wall. 137, and Mason Lumber Co. vs. Buchtel, 101 U. S. 638, it

was held that when the proper construction of a contract was in controversy, the construction adjudged by the Court would bind the parties in all future disputes."

The estoppel here claimed is fully sustained by the decision quoted next from Cromwell vs. Sac County, 94 U. S. 351, 356, restricting the estoppel "to the point or question actually litigated and determined in the original action."

The defense here is that the sale of July 28th 1882 from Knight & Lovett to W. J. Knight was not valid, actual and real; and exactly that question was determined in the former suits of McIlhenny & Co. and Jemison vs. Knight et al. in each of which the judgment neld the sale to be actual, real and valid.

These judgments set up as *res judicata*, must be given the same force and effect in every Court as they have in the Louisiana Courts. 97 U. S. 336; 174 U. S. 714; 176 U. S. 744.

Where, in an action in New York, the matter litigated was whether the plaintiff had accepted or rejected a provision in the will, and resulted in a decree in her favor for certain moneys due by the testator to her, a decree in a subsequent suit, between the same parties in another State, which denies the binding force of the New York decree, is unconstitutional and void. 141 U. S. 87, Carpenter vs. Strange.

"Estoppels are mutual. 4 Com. D. Estoppel, B. They run with the land, into whose hands so ever the land comes; by which the parties and all claiming under them as well as Courts, are bound; were it otherwise, litigation would be endless. Such is the established rule." Accordingly judgment respecting title held binding and not open to subsequent attack. Porterfield vs. Clark. 2 How. 109.

An estoppel arising out of a judgment is conclusive upon all the parties and their privies and may not be invoked or repudiated at the pleasure of one of the parties. Railroad

Co. vs. National Bank, 102 U. S. 22.

All privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity. Litchfield vs. Goodnow, 123 U. S. 551.

Facts established by matter of record, whether admitted or approved, can never be contested between the same parties or their privies. Gould vs R. R. 91 U. S. 534.

Judgment is conclusive in subsequent suit, between the same parties or their privies. Gould vs. R. R. 91 U. S. 584.

Judgment is conclusive in subsequent suit, between the same parties or privies as to matters actually determined or necessarily involved. Pearce vs. Rice, 142 U. S. 36.

Privies are: "All who have mutual or successive relationship to the same rights; * * *; persons whose interest in an estate is derived from the contract or conveyance of others; * * *; those who have mutual or successive relationship to the same right of property or subject matter; those whose relationship to the same right of property is mutual or successive." 32 Cyc. 388, and references.

In 123 U. S. 551, Litchfield vs. Goodnow, this Court quotes from Greenleaf on Evidence, Vol, 1, par. 523: "* * * But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term *privity* denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in the same relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate

in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity. The correctness of this statement has been often affirmed by this Court. Lovejoy vs. Murray, 3 Wall. 1, 19; Robbins vs. Chicago City, 4 Wall. 657, 673; and the principle has been recognized in many cases. Indeed it is elementary. Hale vs. Finch, 104 U. S. 261, 265; Railroad Co. vs. National Bank, 102 U. S. 14, 22; Butterfield vs. Smith, 101 U. S, 570."

Plaintiffs here (Defendants in the suit) having acquired title from W. J. Knight and his assigns are privies to him, and bound by the two judgments relied upon as *res judicata*, in each of which his title was upheld. They must have acquired title from somebody, and whether from W. J. Knight or from D. R. Knight and J. A. Lovett, they are equally concluded by the judgments relied on, because all three of them were parties to the suits and bound by the judgments therein upholding the title of W. J. Knight under the act of sale of July 28th, 1882, during the marriage between the father and mother of Respondents; and as the land was not sold before the death of the wife it necessarily belonged to the community at the date of her death, and an undivided half interest therein was inherited from her by her children, these respondents.

"A decree in equity is conclusive of all defenses available to defendant, whether or not they were presented and litigated. But a judgment at law will not conclude defenses which were of a purely equitable character and therefore not cognizable in an action at law, except in those states where the blending of law and equity permits all defenses, of whatever character, to be set up in an action at law." 23 Cyc. p. 1200, par. h. Such is the law of Louisiana, the courts of equity and the courts of law not being separate here.

"The effect of a former judgment as a bar or estoppel is

not affected by the fact that the action in which it was rendered included more parties than are joined in the suit in which it is pleaded, or that additional parties are joined in the second action; in either case a party or privy to the first action is bound by the judgment and a stranger is not." 23 Cyc. p. 1208, par. c.

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies in the same court or any other court of concurrent jurisdiction, upon the same or a different cause of action." 23 Cyc. p. 1215, par. A, 1 a; Ib top of p. 1218.

"A person who comes into a pending action, by intervention or interpleader, setting up a claim to the subject of the controversy, is concluded by the judgment, and if it is in his favor he may take advantage of it in any subsequent litigation in which the same questions are raised, and the same parties are concerned." 23 Cyc. p. 1248 par. 4.

"A judgment is conclusive and binding, not only upon the parties in the action in which it was rendered, but also upon persons who are in privity with them in respect to the subject matter of the litigation." 23 Cyc. 1253 par. 5 a.

"Privity means a mutual or successive relationship to the same rights of property; and within the rules relating to the conclusiveness of judgments all persons are privies to a judgment whose succession to the rights of property thereby adjudicated or affected were derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that suit." 23 Cyc. p. 1253 par. b.

"If parties litigate a question in a court of competent jurisdiction, and a final decision is given thereon, such parties or those claiming through them cannot afterward reopen the same question in another court." Under Note 69 p. 1253, 23 Cyc.

"A judgment determining title to land, claimed by two persons, runs with the land, and binds all persons claiming through either party to the suit by title acquired after the rendition of the judgment. And as to property generally, both real and personal, a successor in interest is concluded by a judgment for or against him from whom he derived his title, whether it be by purchase, inheritance, devise, or otherwise." 23 Cyc. p. 1256 par. f.

"A judgment in an action respecting real property or titles or rights thereto, against a grantor of such property, is binding on his grantee, provided the latter acquired his interest after the institution of the suit, or after the judgment was rendered." 23 Cyc. p. 1257 par. (111) (A).

"A judgment in a suit to which the husband is a party is binding upon the wife where the suit is in regard to community property. 23 Cyc. p. 1262-3-4 par. j; and also binding upon their children where they claim under the parent. 23 Cyc. p. 1264 par. k.

"A judgment is an estoppel upon a party not only in so far as it decides a question adversely to his claim or contention in the suit in which it is rendered, but where it recognizes or sustains his theory or claim it estops him from afterward taking a different position in litigation with the same opponent. 23 Cyc. p. 1292 (VIII).

"The fact that in the former suit additional property rights or interest were involved does not affect the conclusiveness of the judgment as to that portion involved in the suit in which the estoppel is set up." 23 Cyc. p. 1291, par.

(V). "The estoppel of a judgment extends only to the particular property or right in controversy, except where it determines the title or right under which the party claims, in which case it is decisive as to any other property or right claimed under the same title." 23 Cyc. pp. 1291-2, par VI.

"But if a point or question was in issue and adjudicated in a former suit, a party bound by the judgment cannot escape the estoppel by producing at a second trial new arguments or additional or different evidence in support of the proposition which was decided adversely to him." 23 Cyc. p. 1291, (IV).

"A decision adjudging a conveyance, contract, or other instrument to be fraudulent or invalid is conclusive of that fact in all further litigation between the same parties; and on the other hand, a judgment giving effect to a deed, mortgage, judgment, or contract, is conclusive evidence that it is free from fraud or illegality, even though that issue was not raised in the action, since in that case the judgment necessarily implies a finding that the cause of action was valid and enforceable, except where the party objecting was ignorant of the fraud or illegality before the judgment, or was prevented from pleading it." 23 Cyc. p. 1294, par. e.

"The general rule is that a judgment is conclusive, for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were distinctly in issue and adjudicated, whether the second suit be upon the same or a different cause of action." 23 Cyc. p. 1302, par. 4, a.

"A judgment authorizing a recovery on a written instrument necessarily involves an adjudication of its validity." 23 Cyc. 1308.

"Where the right, title or ownership of property is directly put in issue, whether by the pleadings or the course

of the litigation, and is tried and determined, the judgment is conclusive thereon in all further litigation between the same parties or their privies, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up, * * * its estoppel constitutes a part of the title, and runs with the land, extending to all who are privies in estate to either of the parties. Moreover, a decision on a question of title to lands is conclusive in a subsequent suit between the same parties in respect to other lands, when the lands in both suits have a common source of title, and the title depends upon the existence or non-existence of a fact directly adjudicated in the former case." 23 Cyc. pp 1319-21, par. 10, a.

"Judgment affirming the validity of a sale and transfer of property is conclusive on the parties thereto with respect to all the property covered by the transaction in question, although but part thereof was in fact the subject-matter of the issues in the case in which the judgment was rendered." Peterson vs. Warner, 6 Kan. App. 298; 50 Pac. 1091, cited in Note 66 on p. 1321, 23 Cyc.

"When the validity of a contract is adjudicated in an action upon it, * * * the question is conclusively settled by the judgment for the purposes of all further litigation between the parties * * * " 23 Cyc. p. 1322, b.

In Sadler vs. Henderson, 112 La. 518, on pp. 523 and 524, the Court held that the vendee was privy in contract with his vendor, and entitled to the plea of *res judicata*, as a shield to his title, from a judgment sustaining the vendor's title.

In 152 U. S. 301, on p. 314, this Court commenting on a decision in Campbell vs. Hall, 16 N. Y. 575, said: "Speaking of the rule that a grantee is estopped by a judgment against his grantor, because he holds a derivative title from his

grantor, and cannot, therefore, be in a better position than the party from whom he obtained his right, the court observed: * * *. The principle in such cases is that the estoppel attaches itself to and runs with the land. The grantor can transfer no greater right than he himself has, and hence the title which he conveyed must necessarily be subject, in the hands of the grantee, to all the burdens which rested upon it at the time of the transfer."

The Louisiana law is the same. Article 23 of our Code of Practice provides that: "The universal successors * * * are entitled to the same actions and exceptions as the person to whom they succeed; but they cannot claim, on their own behalf, any right which he had not himself, for this reason, that no one can transfer a better title to another than that which he himself had." Article 24 provides: "The rule laid down in the preceding article takes place also with respect to the successor of a deceased person claiming a thing by virtue of a particular title; that is to say, by sale, donation or legacy, but so far only as concerns the thing itself, of which the deceased has thus disposed of in their favor."

From Justinian comes to us the maxim: "*Nemo plus juris ad alium transferre potest quam ipse habet.*"

Article 2236 of our Civil Code provides: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery." And Article 2242 provides: "An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act."

Article 2442 of the Civil Code provides that: "Sales of immovables under private signature shall have effect against creditors and third persons generally only from registry of

sale and delivery of thing sold," but it further provides; "But this defect of registry shall not be pleaded between the parties who shall have contracted in such act, their heirs and assigns, who are as effectually bound by a sale made under private signature, as if it were an authentic act."

Article C. C, 3556, No. 5—"Assigns means those to whom rights have been transmitted by particular title; such as sale, donation, legacy, transfer or cession." Ib. No. 28:—"Successor is, generally speaking, a person who takes the place of another. There are in law two sorts of successors: the successor by universal title, such as the heir, the universal legatee, and the legatee by universal title and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee. The *universal* successor represents the person of the deceased, and succeeds to all his rights and charges. The *particular* successor succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him."

These several provisions of our Codes show that the parties, their heirs and assigns are equally bound under our law, and the buyer and successor by particular title, as well as the heir or successor by general title, is equally bound with the party to whose rights he may have succeeded. How could it be otherwise? How could any one acquire greater rights than the author of his title had? A man cannot transmit more than he has; so when he transmits any right it goes to the transferee with all the advantages it enjoyed and all the disadvantages it was encumbered in his hands

"A final judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties, or their privies, upon the same cause of action. Successors to, or ayans-cause of, the parties to the original suit are in legal contemplation, the same as such

parties, provided they acquired their title after the institution of the original suit." 109 La. 533, Hargrove vs. Mouton.

On p. 536 the Court says: "Successors to, or ayans-cause of the parties in the original suit are considered in law as having been parties themselves where their titles have been acquired since the institution of the action in which the original judgment was rendered. Delabigarre v. Second Municipality, 3 La. Ann. 236."

"Matters once determined by a court of competent jurisdiction, if the judgment has become final can never be called in question by the parties or their privies, though the judgment may have been erroneous and liable to certain reversal on appeal. This estoppel extends to every material allegation which was at issue in the cause, and was therein determined." 34 A. 805; 109 La. 533; 30 A. 838; 47 A. 234; 49 A. 1332.

"It matters not under what form the question be presented, whether by petition, exception, answer, rule or intervention, whenever the same question recurs between the same parties, the plea of res adjudicata estops." 35 A. 553; 12 A. 197; 46 A. 1082.

"In a petitory action, the defendant is bound to plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff may be pleaded as res judicata against any title which the defendant was possessed of at the time, but omitted to plead." 14 A. 575. On page 576 the Court says: "When an issue is made between the parties to a suit, each is presumed to adduce all the evidence in his power to enable the issue to be determined correctly. If one of the parties neglects or does not wish to introduce a part of his evidence when it is known to him, the issue cannot, after a final decision, be again opened to enable him to do so."

"If this were possible, litigation would be uselessly continued. If a party has four titles, he could institute in succession four different suits, instead of having the issue of ownership terminated in one suit. C. C. 2265; (Now 2286.) Williams vs. Close, 12 Ann. 878." Dowell vs. Applegate, 162 U. S. 327, holds the same thing- that a second suit cannot be prosecuted on a different title held by the party when the first judgment was rendered. To the same effect, 106 La. 530; 109 La. 1030; 3 Wall. 1; 4 Wall. 657; 7 How. 198; 22 How. 352: 6 Wheat, 109.

B and E were tenants under a lease from W of an undivided interest in a mine. After the expiration of their lease they remained in possession recognizing the superior title to the whole mine of H, a co-owner, and denying the title of W. W brought suit against B, E and H, in which suit the title of W was recognized by judgment. Pending that suit a corporation, of which H was president, was formed and put in possession of the whole mine. In a second suit against B, E, H and the corporation, the judgment in the first suit was held to be conclusive of the rights of W as against all the defendants." 110 U. S. 296, Whiteside vs. Hazelton.

"A deed becomes operative from the time of delivery to the grantee, and its operation cannot be affected by proof of any agreement in conflict with the plain terms of the instrument."

"A grantor cannot by any act subsequent to the delivery of his deed invalidate, alter, or affect the instrument." (So, Dr. Lovett cannot now by his testimony invalidate the deed he gave W. J. Knight in 1882.)

"The title of the grantee becomes perfect upon delivery to, and acceptance by him of the deed." 13 Cyc. p. 572, 6, a. b and c.

"Secret unexpressed intention will not be permitted to

vary the deed or change its meaning where the language used leaves no room for doubt." Hoyt vs. Ketcham, 54 Conn. 605, Atl. 606, cited in 13, Cyc. p. 601, note 33.

"Although the object of construing a deed is to ascertain the intention of the parties and especially of the grantor, and although it is well settled that deeds must be construed so as to effectuate if possible the intentions of the parties or of the grantor, it cannot be so construed if inconsistent with settled rules of law or of some principle of law, or in violation thereof, or in violation of some rule of property. * * * *" 13 Cyc. p. 601 & 2, c.

However, the laws of construction contemplate that the intention of the parties is to be ascertained from the instrument itself, from a construction of the language used, and not from illegal oral evidence. 13 Cyc. p. 602 to 611.

"It is the general rule that all parties to a deed are bound by the recitals in it legitimately appertaining to the subject matter. It applies not only to the parties immediately, but to those claiming under them, to privies in blood, in estate, and in law." 13 Cyc. p. 611 and 12 (II.)

"Although denied in an answer by defendant who claimed through a party who executed the deed, a recital may be taken to be true." Note 28.

"Where a mortgage is sought to be annulled on the ground that the mortgagor was not the owner of the mortgaged property, the issue involves the title of the mortgagor, and parol evidence is inadmissible." Barrow vs. Grant. 116 La. 952.

The Court, after considering the limits within which parol evidence is admissible under allegations of fraud, generally in suits by creditors to uncover property of debtors, said further: "But parol is not admissible to show that in a sale of real estate the vendee named in the act was not the

real vendee but that another was. McKenzie vs. Bacon, 40 La. Ann. 157, 4 South 65; Perrault vs. Perrault, 32 La. Ann. 635; Hackenberg vs. Garscamp, 30 La. Ann. 898; Heirs of Dohan vs. Dohan, 42 La. Ann. 449; 7 South. 569; Tille vs, Taylor, 42 La. Ann, 1165, 8 South. 339; Stuerle vs. Kaiser, 44 La. Ann. 580, 12 South. 839; Wheelage vs. Lotz, 44 La. Ann. 600, 10 South. 923. It cannot be done even when the suit is by a creditor, seeking to uncover the property of his debtor. Hoffman vs. Ackerman 110 La. 1070, 35 South. 298."

As Dr. Lovett's evidence taken under commission was excluded, it may not be examined, although brought up with the bill of exceptions, and we do not want it examined, because we consider it totally inadmissible. But from the way plaintiffs' counsel referred to it, it would seem that they overrate it very much. In looking it over we are impressed with the conviction that the admission of such evidence to affect title to real estate would be very dangerous and render such titles very insecure.

The evidence fails entirely to prove the things sought to be established by it; the witness' memory is entirely too indistinct and uncertain on all subjects, besides being blank on the subjects embodied in many of the questions, to make it a safe guide, or even a fair index, in determining the rights of parties. He doesn't remember any of the details of the transaction, nor whether he testified in the suits against him and his partner in which the judgments were rendered, nor, if he did, what his testimony was. He doesn't remember what he testified on the first trial of this case, not even whether he testified to the effect that his testimony in the attachment suits in 1882 tended to support the validity of the sale of July, 1882, but conceded or surmised that, if he said anything about it at all, it was to that effect.

Now, whether this witness' memory is so bad as it ap-

pears to be, or whether he has changed since 1882, in either event, such testimony is surely a very unsafe test of title. We respectfully submit that our law requiring titles to real estate to be in writing, providing that they cannot be affected in any manner except by written evidence, and making parol evidence inadmissible to affect title to real estate, or to vary, alter or destroy written agreements, provides a much safer rule of property than would exist where such oral evidence might affect titles.

The loss which any one litigant might unjustly suffer for want of legal evidence is a very small matter compared to the importance of the stability and reliability of real estate titles. As before said, whatever trouble defendants have got into is due, not to any deffect in our law, but to the risks they voluntarily assumed or to their laches in not having the titles examined.

If defendants' title comes from W. J. Knight they cannot legally question his title; if their title comes from Knight & Lovett, being their privies or successors, they are bound by the same estoppels and restrictions as their authors would be; and surely, no one familiar with the law of Louisiana would pretend that Knight & Lovett could question the recitals of the act of sale in 1882 except by a counter letter, parol being utterly inadmissible.

We therefore pray that the writ of certiorari be recalled and dismissed at the cost of petitioners here; or that the judgment of the Court of Appeals be affirmed, if such be the practice.

Respectfully submitted,

M. J. CUNNINGHAM, JR.,

M. J. CUNNINGHAM,

Attorneys for Respondents.

[N. B.—Since this brief went to press the leading Counsel, M. J. Cunningham, Jr. died.]

Supreme Court of the United States

OCTOBER TERM, 1909

No. 101

LUTCHER & MOORE LUMBER CO. ET ALS., *Petitioners*

vs.

WM. H. KNIGHT ET ALS.

On Writ of Certiorari to the U. S. Circuit Court of Appeals for the Fifth Circuit

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Supplemental Brief on Behalf of Respondents, Plaintiffs in the Suit.

M. J. CUNNINGHAM,
Attorney.

While waiting for the case to be called, counsel has had the opportunity to analyze Petitioners' Brief, and having written criticisms, we have concluded to have the work printed, and beg leave to file it herein as a supplemental brief.

Regarding this position that the court was without jurisdiction, it is sufficient to say that the Circuit Court assumed jurisdiction on defendants' petition for removal of the cause from the State court, indisputably a court of competent jurisdiction, both in law and equity. They did not ask for its transfer to the equity side of the Federal Court. They carried the case where they wanted it, over the zealous objection of plaintiffs, they went to trial without exception to jurisdiction; they were well satisfied with the first judgment, as it was in their favor, and when plaintiffs appealed they tried to maintain the judgment of the court, which they now say had no jurisdiction. When the Court of Appeals reversed the judgment and ordered the return of the case to the State court, which has all the equity powers they now invoke, they avoided the execution of the order to return by amending the petition for removal, and provoked the action of the Federal Court retaining jurisdiction, still failing to ask for the transfer of the case to the equity side of that court, and still failing to question the jurisdiction of the court. When the demurrer was sustained and their bill in equity dismissed they took no appeal, but acquiesced in the judgment and went to trial a second time of the case as brought by plaintiffs and again failed to accept the jurisdiction of the court and ask for its transfer to the equity side of the court.

In their brief defendants (plaintiffs here) say there is no proof that the validity of the title under the act of sale by Knight Lovett to W. J. Knight, July 28, 1882, was put at issue or that issue was determined by the judgments plead as *res judicata.*

The petition in one of the cases, Record, p. 39, avers that Knight and Lovett had "disposed of a large part of their property * * * with intent to defraud their creditors, including petitioners," and therefore they asked for an attachment, which was issued, and was levied upon movables

covered by this title of July, 1882, during the following month of August, 1882. In his petition of intervention in that suit, beginning at the bottom of R. 41, and filed in September, 1882, W. J. Knight averred that under the writ of attachment issued in that case the sheriff had seized "ten (10) yoke of oxen, three (3) log carts, one (1) log wagon, six (6) log chains and one (1) set of blacksmith tools * * * and that he is the legal, just and *bona fide* owner of said property * * * and now intervenes in said suit No. 60, claiming said property so attached to belong to him, as seen by act of sale and purchase from said defendants," &c. Plaintiffs and defendants were cited to answer the intervenion (R. 43). In their answer to the intervention (R. 45) plaintiffs specially averred "that said intervenors alleged title to said property is a pretended deed of sale to him from the defendants in said suit, and that said pretended deed and the pretended contract of sale evidenced by said deed, were and are a mere and fraudulent simulation and illegal, null and void." In the judgment in that case, beginning at bottom of R. 45, it was "ordered, adjudged and decreed that said intervenor, William J. Knight, do have judgment against said plaintiff McIlhenny Company, recognizing and decreeing said intervenor to be the rightful owner of the property attached in said suit, under and by virtue of intervenors purchase thereof from said defendants, by the act of sale executed July 28, 1882, in evidence in said suit, which act of sale is hereby decreed to be a real sale and not a simulation."

In the suit of Jemison *vs.* Knight & Lovett, a similar allegation for attachment was made, R. 47; in his petition of intervention in the Jemison suit, W. J. Knight averred that the sheriff, under the writ of attachment in that case, had "attached and taken in his possession a certain lot of goods, wares and merchandise generally" * * * and that he was the owner of the property so attached, as seen

by the sale from defendants duly recorded. After being duly cited plaintiffs filed an answer which contains the same averment that the sale to W. J. Knight was a fraudulent simulation, &c., R. 56; and the judgment likewise upheld W. J. Knight's title, and decreed it to be a real sale and not a simulation. The title so upheld and decreed to be a real sale and not a simulation is to be found in the Record on pp. 31 and 32, and covers the land here involved and the movables attached in those suits.

So, it is clear that, as between W. J. Knight, intervenor, and both plaintiffs, and defendants in said two suits, the validity of the act of July 28, 1882, as a title, was in issue, and the only issue, and was directly determined by the judgments in both cases, which judgments are a final determination of that question as against all the parties to said suits and their privies, successors and assigns. Defendants having acquired title by purchase from a party to the act of July, 1882, as well as a party to the suits in which the judgments were rendered, are privies by contract to said party, the author of his title, and concluded by the estoppels that affected his author, and which estoppels became attached to the land and followed it into the hands of the purchaser—the then owner and vendor being unable to give any better title than he himself had.

Under the pretext of a right and an attempt to rebut the presumption that property acquired during marriage belongs to the community, and ignoring the fact that where such proof has been admitted the question in every case cited was, not whether the sale was simulated or real, honest or fraudulent, whether the apparent vendee was the buyer or a person interposed, but only whether the property was paid for with the wife's separate funds, defendants have sought to ignore and violate the provisions of the Louisiana law that sales of real estate must be in writing, that the only means allowed to prove, as between the parties of their privies,

that a sale is simulated, or that the real contract was different from the act as written, is by a counter letter, or by interrogatories on facts and articles by one of the parties to the other, whose answers are final and cannot be contradicted, that parol is inadmissible to vary, contradict or alter the terms of a written contract, that a party or his assigns cannot prove by parol what was said before, at the time, or after signing an act, that the act as written is conclusive proof of the contract, that parol is inadmissible to prove that the apparent vendee was not the real buyer, but an agent of others, that a party cannot question the title of his author, that when the pleadings or evidence show that both parties derive title from the same person neither can dispute the title of their common author, that parties are estopped and bound by their acts and by judgments in suits to which they were parties, that such estoppels have equal force against privies, that the buyer is privy by contract to his vendor, that estoppels attach to the land and follow it into whosoever hands it goes, that a judgment adjudicating upon a title covers everything covered by the title whether involved or not in the former suit, that judgments must be given the same force by all courts.

To sustain our contention that all these things are true and that the evidence offered is inadmissible under some one or other of these heads, we have cited over a hundred authorities in our brief.

The case cited by defendants in 129 U. S., 387, Ruckman vs. Cory, that only a court of equity can compel the surrender of a legal title held by defendant, has no application under the law of Louisiana, where there are no such distinctions in the character of proof and relief permissible in actions at law and in equity. In Louisiana the only way a party can contradict the terms of an act are (1) by counter-letter, and (2) by the answers of the other party to interrogatories propounded to him. If Cory had wished to secure

Ruckman in the way he did with land in Louisiana, the only certain way he could possibly have done so, without putting himself completely in Ruckman's power, was to require and obtain from Ruckman a counter-letter acknowledging his title; and if he had failed to do that, his only remedy was to sue Ruckman before he transferred the land, propounded interrogatories and trust to Ruckman's answers.

But in that case Ruckman's transferree had allowed Cory to remain in possession as owner for many years and her action in ejectment was Cory's first notice of her claim of title; so, the court held that she and not Cory had been guilty of laches, quoting from a decision of the State court (Illinois) that: "The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so."

But, even in that case, the court in referring to depositions of witnesses as to statements made by Ruckman (he having died before the institution of the suit) favorable to Cory and against the interest of the defendant, his grantee, the court said: "This evidence, it is contended, and properly so, was incompetent under the well established rule that 'a grantee in a deed is not affected with the declarations of the grantor made after the execution and delivery of the deed unless, with full knowledge of such declarations, he acquiesces in or sanctions them.'" So, here, we cannot be affected by the declarations or evidence of Dr. Lovett as one of our grantors.

Defendants' brief quotes from 90 Fed., 711, that: "Legal and equitable causes of action cannot be joined in one suit in the courts of the United States;" but if this suit is open to that criticism, of presenting both legal and equitable causes of action, a complete reply to defendants' objection is that we are not responsible for the case being in the Federal courts; the suit was instituted in a State court, with ample jurisdiction to try and determine all issues whether pre-

sented in legal or equitable causes of action, and where no such distinction exists. Defendants having procured its removal, having lodged it where they wanted it, never having suggested a transfer to the equity side of the Federal Court, nor excepted to the jurisdiction, they cannot be heard at this late day, after taking the chances of success in the court of their own choosing, to question the jurisdiction sought and accepted by them.

Besides, the power of removal does not include the power of destruction. The case cited in 90 Fed., 711, was instituted in the Federal Court and the precise rulings there may not be applicable to a case removed from a State court. We respectfully submit that when a Federal judge orders the removal of a suit from a State court, in which it was properly brought, he must try it as he finds it. Plaintiff in the suit cannot be compelled to bring his suit over again so as to conform to Federal practice, but, even if he can, no effort was made to have these plaintiffs do so, and defendants are not now in a position to question the jurisdiction of the court of their own choice.

The same language is to be found in Foster's Federal Practice, §360a, also cited by defendants; and that paragraph provides that: "In actions at common law in civil causes, the Circuit and District courts of the United States follow the forms and rules of pleading observed in the courts of the State where they are held, except in those particulars that are regulated by Federal statutes. The same rule applies as regards the joinder of parties, the joinder of causes of action, the joinder of defenses, the verification of pleadings, the time and manner of service, and the amendment of pleadings. The pleading of an equitable defense of an equitable set-off is not permitted at common law. But where the State practice so permits, the defendant may plead as a set-off a cause of action at common law against the plaintiff."

We are unable to find the clause purporting to be a quotation from Foster's Federal Practice, 4 ed., vol. 2, section 360 (a), sec. 375 (see bottom of p. 10 and top of p. 11 of defendants' brief) in §§360 (a) or 375; but we do not find a provision in §375 that is destructive to defendants' claimed right to adduce the proof rejected, whether it be offered in a suit at law or bill in equity. That provision is on p. 1299, and reads: "Where the decisions of the courts of a State have established a local rule of property, they will usually be followed by the Federal courts held within such State. The statute law of a State will always be followed by a Federal Court there held, so far as the statutes establish a local rule of property; and nearly always, so far as they create or abolish rights as distinct from remedies." And on p. 1304 we find this: "The title to land formed by accretion, the rights of riparian owners in the bed of a stream, whether navigable or otherwise, the validity of tax sales, the duty of the grantee of a coal mine to sustain the surface, the rights of abuttors in streets, the law as to what constitutes possession of land, and generally all questions affecting real estate, in the absence of constitutional difficulties, depend upon the local rule of property."

So, even the authority cited by defendants destroys their case. The rights of the parties to this suit, as in all cases regarding real estate, must be determined by the law of the State in which the land is situated, and there is no support for defendants' contentions in the law or jurisprudence of Louisiana.

Defendants' contention that the plea of *res judicata* is not before the court, because plaintiffs waived it by going to trial without a trial upon it, is without merit, and is not sustained by the authorities cited by him for that purpose. The case cited in 14 L., 430, has no reference to such exceptions as this, as it merely decides that "an exception to the form of action will be considered as waived, by filing an

answer to the merits." As to such exceptions (those relating to form) the Louisiana Code of Practice, Art. 344, provides that: "Such exceptions must be pleaded *in limine litis* * * * After the defendant has pleaded to the merits, such exceptions shall not be heard; all nullities are cured." So, evidently, the court could not hold otherwise with an exception to mere form. The case cited in 16 La. 414, has no tendency to sustain defendants' contention here, as it merely held that where defendant set up a plea in reconvention for reimbursement for improvements on land, he could not be heard to plead *res judicata* against plaintiffs' demand for rents and revenues, on the ground that they had not been allowed in the judgment decreeing plaintiff to be the owner of the land; but that case furnishes strong authority against defendants' contention here, because the plea of *res judicata* considered and decided in that case was only filed on appeal.

But the law regarding peremptory exceptions formed on law, is very different from that governing exceptions to form. Article of Louisiana Code of Practice 346 provides that peremptory exceptions founded on law may be pleaded in every stage of the action previous to final judgment. Article 345 describes peremptory exceptions founded on law as those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed or because the cause of action has been destroyed or extinguished. It needs no special provision or argument to show that a plea of *res judicata*, if good, destroys and extinguishes plaintiffs' right of action. Definitive or final judgments are such as decide all the points in controversy between the parties; they are such as have the force of *res judicata*. The points of contention, the issues involved, the things adjudged, as between W. J. Knight, intervenor, and the plaintiffs and defendants in the two cases set up as *res judicata*, were (1) that the property

attached in those suits was acquired by intervenor under the act of sale of July 28, 1882, and (2) that that sale was not a simulation, but a real, valid sale, and conveyed a perfect title to the property covered by it. It therefore follows that those judgments necessarily destroy the defense in this case, it being based solely on the invalidity of the act of July 28, 1882, which was held to be valid by those judgments.

Defendants quote Article of the Louisiana Civil Code 2286, misnumbering it 2268, possibly to contend that it is more restrictive than similar provisions in other jurisdictions; but an examination of the jurisprudence of Louisiana, as well as the decisions of this court in Louisiana cases cited in our brief, will show that it is construed so that, if different in any way from other similar provisions, it is given by the courts just as broad an operation as in other jurisdictions. We do not fully understand defendants' object, but presume it is to bolster up a contention which they sometimes appear to make, and sometimes not, that they are not bound by the estoppels which might have affected the authors of their title; but the authorities cited in our brief already filed effectually overcome any such contention. Indeed, in the notes under the article cited (2286) in Merrick's Code, several decisions are cited to show that the effect of judgments as *res judicata* extends to successors, assigns, and all who claim through them.

> 8, A. 126, Johnson *vs.* Weld; 47, A. 235, Fleitas *vs.* Mereaux—and others.

The case cited in 177 U. S., 390, does not sustain any contention of defendants; on the contrary, it holds that a judgment is *res judicata* of every defense which might have been set up, even though not actually presented. Our brief contains many authorities to the same effect.

The case in 5 Louisiana, A. 103, may have been cited because it says a judgment is not *res judicata* of issues made in the pleadings but not decided. Whether correct or not, it has no application, because the judgments claimed to be *res judicata* here decided all the issues presented in the pleadings. A similar criticism is just of the citation to 48, A. 1170.

As said in our brief on file, the various changes and shifting of positions of defendants in this case are very interesting, but have no legal support. These changes are manifest from the first answer filed to the last brief filed. When the learned counsel presently in charge of defendants' interests filed his supplemental brief in support of the application for certiorari, while disclaiming any right to prove title by parol, sought to have recognized his asserted right to prove by parol the creation of a trust, which would establish title by parol. In brief filed last, on January 18, still disclaiming the right to establish title by parol, they beg for the right to overcome by parol the presumption of community ownership, which would prove title by parol; and they cite cases in which they erroneously assert that the Supreme Court of the State allowed proof of title by parol, and then ask if others can, why not they?—thus showing their repeated disclaimers to be meaningless, and their only real object to be to prove title by parol.

In describing what falls into and belongs to the community the Civil Code mentions the estates which husband or wife may *acquire* during marriage; and on this slight foundation ingenious counsel assume that the Code covers only what the community acquires, not what each spouse may acquire; then contends that property put in the name of the husband without intention to sell it to him is not "acquire," so does not belong to the community; and then innocently undertakes to prove by parol that the recitals in the act of sale are not true, that the act does not contain the

true contract, that no sale was made, that the object and intent of the owners was not to sell the property, that the object was to constitute the apparent vendee the agent of the apparent vendors to manage and to sell the property for them, the real owners. In this effort, defendants blandly ignore all the provisions of the Louisiana Civil Code and hundreds of decisions of the Supreme Court, interpreting the codal provisions, as well as the fact that they, being the successors, assigns, privies of the parties to the act of sale, and to several suits where it was decreed that property acquired under that title belonged to the vendee and that said act was a real, valid sale, and not a simulation, and that they, as well as the original parties are estopped from questioning the recitals of the act or again raising questions settled by the judgment—all in violation, not only of the Louisiana law, of positive and unquestioned law in every jurisdiction we know of.

One glaring and fatal defect in defendants' pretentions in this regard is that they appeal to authority that does not bear them out or sustain them, because they seek to use decisions for a purpose entirely beyond their scope or purpose. Where the Supreme Court has sanctioned the use of parol to show whether or not property was paid for with paraphernal funds of the wife, in order to determine whether it is community property, or the separate property of the wife, defendants affect to think that was admitting parol to establish title, and sanctions their request here. Far from it.

In the case cited in 30 La., An. 167, the wife had bought property with her separate paraphernal funds, and was allowed to prove the facts, how she made the money, where it had been, and how her husband had never had the administration of it, in order to overcome the legal presumption of community ownership, not to disprove but to sustain the recitals of the act, not to establish title by parol,

because she had already a written title, not to establish facts she was estopped from asserting but to strengthen previous recitals.

In their brief, defendants say they set up in their answer that the act of July, 1882, was a fraudulent device to screen the property of Knight and Lovett. As a matter of fact, the word fraudulent was not used, and fraud is nowhere charged in the pleadings. But the law does not constitute defendants the champions or guardians of the creditors; and that very question was finally settled, contrary to defendants' contentions, in several suits of various creditors instituted for the express purpose of maintaining defendants' present contention—a vain contention about the thing adjudged—settled nearly thirty years ago, defendants' authors being parties to the suits, as well as the act.

The case cited in 29, A. 511, does not sustain defendants; but, on the contrary, it holds that parol is not admissible to prove fraud in the transfer of real estate except in a suit by creditors or forced heirs and on an allegation of fraud; and that, as between the parties and their legal representatives, parol evidence is inadmissible to show simulation, and that only a counter letter can avail such persons—just as we contend here. In that case the suit was brought by an administrator who represented the creditors; but he had not made the necessary allegation of fraud.

We cannot see that the case cited in 34, A. 1243, sustains defendants. That was a question of nullity of a tax title and the oral evidence, if any, must have been to show fraudulent conspiracy between the tax collector and the purchaser. But the tax title was annulled on the grounds that: "There is no evidence that the property was seized or advertised according to law. The sale was never recorded, and until it was recorded under the law, the Auditor could not affirm title. It is too clear to be disputed that all the statutory requirements in tax deed or sheriff's deed must be complied

with." So the judgment was not based on oral evidence, whatever it was; and the judge specially said he did not consider it necessary to enter into a review of it.

In 4, Rob. 290, parol was admitted to protect children of the first marriage from the supposed fraud of their step-father and tutor, on the theory that a counter letter their father should and might have probably fell into the hands of and was suppressed by the step-father and tutor.

Defendants' brief assumes that the act of July, 1882, was a simulation as a sale, and was the creation of a secret trust in fraud of the law; and says if Knight and Lovett had died before W. J. Knight executed his trust their heirs could have brought a bill alleging the secret trust and the reason whereof, and W. J. Knight would have been compelled to answer, notwithstanding the statute of frauds. That is so, but they could have compelled an answer in the only manner provided by law, by propounding interrogatories to him, and his answers would have been final, and plaintiffs would have had no legal right to introduce any other evidence. Defendants are in no better position and have no greater latitude regarding evidence than Knight and Lovett's children, or than Knight and Lovett themselves; and none of them have a right to such evidence as defendants seek to get in.

The citations in defendants' brief from Perry on Trusts and Bump on Fraudulent Conveyances have no application, because they evidently refer to suits by creditors under proper allegations to protect themselves from fraud—such suits as can only be prosecuted by persons, forced heirs or creditors, interested in the estate of the apparent vendor. Defendants are not in a position to demand such rights. They have no better title than their author had, and are bound by all the estoppels that affected their authors. Besides, if those authorities went as far as defendants claim, what they say would have no weight in this case, because violative of the law of Louisiana, which governs.

Defendants' claim that, even admitting that parol is inadmissible to prove that the apparent sale to W. J. Knight was a simulation, they still have the right to show that the property, although acquired during marriage, did not belong to the community, it devolving upon plaintiff to prove that it did belong to the community.

The trouble with defendants is that they always seek the same thing—their little variation in names works no change in substance. The only proof necessary for plaintiffs to introduce is the act of sale to their father during the life of their mother, and that creates the presumption that it was community property. The act makes full proof of its contents, full proof of the fact and date of the sale; and the law makes it community property. In every case, the person holding the contrary view carries the burden of proof, and they cannot discharge it by illegal evidence, by making oral proof where written is required.

Of course, defendants' assertions of right to prove that the act of July, 1882, was not a sale, but a simulation; that it was not a sale, but a gift; that it was not a sale, but the creation of a trust or agency; that while none of these things may be provable by parol, they still have the right to prove that the property did not belong to the community—all mean the same thing. Whatever they may call it, it is merely and always a bold attempt to establish title to real estate by parol. The only possible way of proving that the property did not belong to the community is to prove that the act of July, 1882, was not a sale, and conveyed no title. If any title was conveyed at all, it was to the community. That is too plain to argue; and defendants cannot overcome the actual facts without trampling under foot eight or ten provisions of law which constitute the only protection to real estate titles in Louisiana.

The case cited in 50 La., An. 1228, has no bearing, because it was proved in that case that the wife paid for the

property with her parphernal funds, that she had ample means, and the community nothing. No such condition exists here. The statement in that case, also in 48 La., An. 785, and numerous others, that the presumption of community ownership can be overcome by proof furnishes no support to defendants' contention here, because they did not involve proof of title by parol. Defendants ask: "If it can be proved that the property purchased during marriage does not belong to the community but is the property of one of the spouses, why can it not be shown that it is not the property of either?" If they admit that the property here involved "was purchased during marriage," as above question concedes, they abandon all shadow of a case, even if it was ever as much as a shadow.

Of course, the question decided in 48 A. 783, 785 and 35 La., A. 571, that proof *aliunde* must be made that property purchased by a married person was paid for with the separate funds of the purported purchaser, is well settled, and it gives no excuse for defendants' action here.

We cannot see that the case cited in 2 How., 648, 650, affects this case. There it was charged that executors had fraudulently had a will probated when they knew it had been superseded; that under the superseded will the property had been brought by parties after notice of the illegal and fraudulent probate of a revoked will; that the legal heirs of decedent had brought this complicated suit seeking to be recognized as heirs at law and to have the proceedings under the revoked will set aside—being a sequel to another case twice before the court, reported in 13 Peters, 404, and 15 Peters, 9. Of course, if the facts were as alleged, plaintiffs were entitled to a remedy in some court, and to recover the property from the purchasers, who illegally held it, whether their acts created a trust or not; but the facts there are totally unlike those here, there is no sanction there for proof of title by parol, and that case gives defendants no support.

The citation from Story Equity Jurisprudence, Sec. 1531, Vol. 2, p. 1857, 13th Ed., furnishes no support for defendants' pretensions; on the contrary, it shows they have no such right. When Story speaks of the admissibility of parol to rebut a presumption, he does not mean that it is so admissible when it is apparent that, under the protext of an effort to rebut a presumption arising from an act, they are seeking to destroy the act itself, and to do things which involve the violation of numerous provisions of law, and disregard estoppels by which they are bound. In the quotation from Story, on p. 23 of defendants' brief, that distinguished author says "the same rule prevails in equity as at law, that parol evidence is not admissible to contradict, extend or vary written instruments; and that the interpretation of them must depend upon their own terms." As the whole statement must be taken together, from the foregoing it necessarily follows that when he says: "But in case of accident, mistake or fraud" parol is frequently admitted, &c., he does not mean that parol can entirely set aside the written instrument—contradict, disprove and defeat it entirely, as defendants apparently seek to do here.

Likewise, when he says parol will be allowed to rebut a presumption, &c., he does not mean that a party, on the pretense of rebutting a presumption, can destroy the instrument entirely and prove by parol things requiring written evidence, because he immediately says: "But in these latter cases they do not interfere with or repel the proper construction of the instrument itself, but only the artificial rules of presumption or of equity which they themselves have created or applied to cases perfectly indeterminate in their nature, and admitting of either construction according to the real intent of the party." Under their own authority as quoted in their brief, it is clear that defendants had no right to introduce the evidence offered and rejected.

The case cited in 35 A. 572 is merely another case where

the court reiterated that proof outside the recital in the act must be produced to show that the separate funds of the wife were used to pay for property bought in her name, to overcome the presumption of ownership by the community. These cases have no hearing, except to strengthen our claim of ownership. No one questions the right of defendants to rebut the presumption of community ownership by proof, such as was admitted in all those cases, whether written or oral, that the husband bought the property with his separate funds, and all about how he got the money and how it was separate funds. But these cases furnish no authority for defendants' efforts to contradict the recitals of the written act of July 28, 1882, as they are evidently attempting to do.

Of course, property bought during marriage for $15,000.00, on terms of $500.00 cash and $14,500.00 on a credit, could hardly have been bought for the separate account of the husband. In fact, it is perfectly evident that it was community property, and it is plain that when defendants pretend to seek to overcome the presumption of community ownership their real object is to defeat and contradict the entire act.

The case cited in 118 La., 462 could hardly be authority here where there are no similar facts. That was a case where a man bought a piece of property and took the title in his name as natural tutor of his daughter, although he was not her tutor, her mother being still alive, and the court never having confirmed him.

Besides, if he had been tutor, he could not have bought the property, as such, for Art. 363 of the Louisiana Civil Code says: "The tutor cannot borrow for the minor, purchase for him unmovables or compromise respecting his rights, without authority from the judge granted on the advice of a family meeting." Afterwards, he sold the property as natural tutor of his daughter, which the above quoted article also forbids. As the court said, somebody

bought the property; the vendor had been paid for it and transferred his title; the father paid the money, and as he was not tutor and had not been authorized to invest any money for his ward, the acquisition must have been for his own account, and his purchase and sale were not vitiated by unnecessarily and illegally adding the quality of tutor to his name, as vendee first and then as vendor, and therefore he conveyed a good title in law to his vendee. This would seem the inevitable conclusion on the law and in the absence of any record of proceedings confirming him as tutor and authorizing him first to buy and then to sell the property for his ward. Therefore oral evidence as to his declaration and insolvency were of no importance, and whether admitted or excluded, could not affect the result. But it will be observed that, whether that oral evidence were important and admissible or not, its object was not to prove title by parol, but to show the quality in which the father acted, not to destroy the act or defeat the title conveyed by it, but to clear the title by showing that the father really acted in his individual capacity and interest, which he had a legal right to do, and not as tutor, as erroneously stated, which would have been fatally illegal, both in the purchase and sale; and this brings us back to the starting point that as the records did not show that the father was tutor and had been authorized to buy for his daughter in the manner prescribed by law, the daughter, the plaintiff in that suit, never had any title, could not possibly have recovered, and consequently the parol evidence was of no importance.

Counsel's contention on p. 27 of their brief that on the trial they had a right to show that when the intermediate transfers were made no price was paid to W. J. Knight, can not avail them, first because the record does not show any complaint by bill of exceptions or otherwise at the rejection of such evidence or that it was offered, and second, if it does, it would not influence the case, it not affecting the legality

of those intermediate transfers and whose legality is not in question, except in so far as it might tend to show the simulation of the act of July, 1882, which could not be done by the parties thereto and their privies except by a counter letter, and which cannot be done in any manner, even by counter letter, since the rendition of the judgments set up as *res judicata*. Defendants are only the successors by particular title, the assigns, the privies by contract of the parties to the act and suits of 1882 and equally bound with them, and are effectually estopped from questioning the legality of that sale. This estoppel is complete, and needs no re-enforcement by reason of the act itself, the parties and their privies not being allowed to contradict, vary or destroy their act. But that perfect estoppel was re-enforced by judgments in several suits to which all the parties to the act of sale were parties, the vendors as defendants and the vendee as intervenor, in which suits the ownership of property under that act and the validity and reality of that act were the only issues, and which judgments passed upon those issues, sustained the ownership claimed under that title, and held that act to be real and valid, and not simulated.

There is nothing in the claim of defendants that the plea of *res judicata* was waived and is not before the court, because we went to trial of the case without a previous trial of the exception. The case cited in 4 La. was on an exception to form, which, if sustained, would only cause delay, and which the Code of Practice provides must be filed before answer; but *res judicata* is a peremptory exception founded on law, which, if sustained, effectually and finally destroys a cause of action and causes the rejection of the demand, and which the Code of Practice provides can be filed at any stage of the proceedings before final judgment. In 16 La., the other case cited by defendants, the plea was filed on appeal. Indeed, we doubt if it was necessary in this case to file a specific plea. It was set up against an issue raised

in the answer and no counter plea by plaintiff is necessary in Louisiana. It could have been urged, and proof introduced to sustain it, in objecting to evidence offered. In fact, in a case of this kind its only object was to exclude evidence, and whenever the plea was filed, whether before trial, or when the evidence was offered during the trial, there was no occasion to try the exception or to file the evidence to sustain it until the evidence was offered at which it was aimed. At any rate the plea was urged, the evidence to sustain it filed, the evidence at which it was aimed rejected, and therefore the plea was sustained, in whatever shape it came up.

Considering that no man can give a better title than he has, it seems elementary that the title in any sale passes to the vendee, not only clothed with all the rights and advantages enjoyed by the vendor, but necessarily encumbered with all the defects and estoppels that affected the vendor, and therefore defendants have no greater rights than their author, whoever he may be, and are estopped from doing anything and from proving anything his author could not do or prove under the law. The authorities cited in our brief on file fully sustain this position; and it seems to us impossible to grant relief to defendants without reversing jurisprudence and upsetting principles universally recognized. This is only one of the phases of the defense. They not only appear to think they are not affected by the estoppels which affected their author, and whoever he was, whether W. J. Knight or Knight & Lovett, or all of them, it is the same thing, as all were parties to the acts and to the suits, they disregard the prohibition that forbids any man from questioning his author's title, the requirement of written title, the prohibition against parol to affect titles and written instruments, proof of agency by parol, proof that apparent vendee was really agent of others, &c., &c. It seems to us the defense is devoid of legal merit.

The Record, pp. 95 to 102, shows that plaintiffs here filed a bill in equity, No. 286, in the Circuit Court, setting up the same matters urged here; that the respondents here filed a demurrer to that bill; that judgment was rendered sustaining the demurrer and dismissing the bill. That judgment was rendered February 16, 1904, no appeal was taken, it is now final, and we plead it as *res judicata* against the relief sought by plaintiffs here. It makes no difference whether that judgment was correct or not, plaintiffs' failure to appeal from it was an acquiescence in it, and it binds and estops them from now urging the same matters set up in that bill. The authorities cited in our original brief fully sustains this contention.

The facts as to this bill, the demurrer, the judgment and no appeal are also stated in the brief filed for plaintiffs here, pp. 6 to 8; and on p. 13 of their brief they admit that the judgment sustaining the demurrer and dismissing the bill was "acquiesced in by the defendants there (petitioners here) and became *res judicata* as to them. The effect of this ruling was to place the case on the law side of the court to be there disposed of according to the rules of practice governing the trial of such cases in the State of Louisiana (U. S. R. Stats., Sec. 914)." This seems to finally dispose of petitioners' demands here, and cause a recall of the writ of certiorari and a dismissal of the case.

Respectfully submitted.

M. J. CUNNINGHAM,
Attorney of Respondents.

LUTCHER & MOORE LUMBER COMPANY *v.* KNIGHT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 101. Argued January 24, 1910.—Decided April 11, 1910.

A party who as defendant in an equity case has successfully asserted that his adversary's claim is not cognizable in equity, cannot subsequently in an action at law brought by him against the plaintiff involving the same matter assert that the same claim set up as a defense is of an equitable character.

The objection in an action at law in the Federal courts that a defense is of equitable cognizance cannot be taken for the first time in the appellate court. *Burbank* v. *Bigelow*, 154 U. S. 558.

On certiorari granted under the provisions of the Court of Appeals Act

of 1891 the entire record is before this court with power to decide the case as presented to the Circuit Court of Appeals on the writ of error issued by it.

The great purpose of the Court of Appeals Act to which all its provisions are subservient is to distribute jurisdiction of the Federal courts and to relieve the docket of this court by casting on the Circuit Courts of Appeals the duty of deciding cases over which their jurisdiction is final.

Although ordinarily the mandate of this court in cases coming to it on certiorari to the Circuit Court of Appeals goes directly to the Circuit Court, where certiorari is granted, solely on the ground that the Circuit Court of Appeals has failed to consider the case, the judgment will be reversed and the case remanded to that court with instructions to hear and decide it.

THE facts are stated in the opinion.

Mr. A. P. Pujo, with whom *Mr. George E. Holland* was on the brief, for petitioners.

Mr. M. J. Cunningham, with whom *Mr. M. J. Cunningham, Jr.*, was on the brief, for respondents.

MR. JUSTICE WHITE delivered the opinion of the court.

On January 28, 1882, Dan R. Knight and John A. Lovett sold to William J. Knight several tracts of land situated in the State of Louisiana. The price stated in the act of sale was $15,000, $500 cash and the balance, $14,500, on credit, evidenced by a note of the purchaser. On February 5, 1887, W. J. Knight sold to Viola P. Knight, wife of Dan R. Knight, a one-half interest, and on February 7, 1887, he sold to J. C. Knight a one-fourth interest in the same lands. The remaining one-fourth interest was parted with by an act of sale dated April 13, 1889, wherein W. J. Knight joined with Viola P. Knight and John C. Knight in selling the entire land to Henry J. Lutcher and G. Bedell Moore. On April 3, 1901, Moore sold his undivided one-half interest to the Lutcher & Moore Lumber Company. All these acts of sale were duly recorded in the proper land conveyance records.

In March, 1903, William H. Knight, his brother, and two sisters, one a married woman, whose husband joined in the suit as a merely technical party, commenced this action in the state district court of Vernon Parish, Louisiana, against Henry J. Lutcher and the Lutcher & Moore Lumber Company, asking to be adjudged the owners of and to be entitled to the possession of an undivided half interest in the lands bought by William J. Knight in 1882 from D. R. Knight and John A. Lovett. The right of ownership was based upon the averment that the petitioners were children of William J. Knight; that the property bought by him was acquired during the marriage between their father and mother; that it formed a part of the community existing between them and constituted an acquet of the community at the time of the death of the mother in August, 1885. The right of the father to sell, in 1887 and 1889, the one-half interest belonging to their mother, as the result of her community estate, was denied, and it was charged that the defendants who were in possession in virtue of the attempted sale made by the father were mere trespassers. It was besides averred that William J. Knight, the father, married a second time, in June, 1886.

Because of diversity of citizenship the cause was removed into the Circuit Court of the United States for the Western District of Louisiana. In that court the defendants answered. In addition to averring that the petition disclosed no cause of action and denying generally all the allegations of the petition not expressly admitted, it was averred: That William J. Knight had never intermarried with the mother of the petitioners; that even if there had been such a marriage and a community resulting from it, the property sued for was not an acquet of such community, because it was the separate property of W. J. Knight, as no cash price was ever paid by him for the property and no note given as recited in the notarial act of sale, and, although the transaction was put in the form of a sale, it was only ostensibly so, having been merely intended to be a donation to him of the property. It was, how-

ever, moreover alleged that the property never formed part of a community existing between Knight and his alleged first wife, even if there was such community, because the property was conveyed to him under a secret agreement, for the benefit of his vendors, and that all the subsequent transfers were in pursuance of such agreement. It was further alleged that the sales to the defendants were executed in good faith for valuable considerations without notice or knowledge of the claims of plaintiffs, Knight being then married and there being no evidence of record of a previous marriage or of the death of the alleged previous wife. In a further paragraph of the answer it was claimed "that the pretended sale made July 28, 1882, to said William J. Knight was a simulation and a fiction," and that the seeming grantors made said pretended sale for the sole purpose of screening said property from the pursuit of their creditors; "that the property never became community property, but always belonged to said Knight and Lovett, as William J. Knight and his alleged wife and all parties well knew, until the sale made April 13, 1889, by W. J. Knight, John C. Knight and Viola P. Knight to Henry J. Lutcher and G. Bedell Moore." The respective interests of the defendants in the land were next averred, their vendors were called in warranty, and it was prayed that in the event of eviction defendants might recover of their warrantors the proportionate amount of the purchase price which they had received. An amendment to the answer was subsequently filed October 27, 1903, amplifying the claim that the sale in 1882 to William J. Knight was not *bona fide*, but was for the benefit of the grantors, and included both movable and immovable property belonging to said vendors, and averring that the $500 recited cash consideration was paid, but with money of the grantors, and that a note was executed, but with no intention to pay the same or to demand payment thereof, and that it was in fact redelivered to Knight without his making payment, and it was averred that the pretended sale constituted only a paper title to the property, "and same never in fact nor in law became the

property of the community between him and his so-called wife; and no interest whatever in said property vested in said community, and the said plaintiffs herein are without right or equity to any right, title or interest in the said lands." The prescriptions of one, two, four, five and ten years were also pleaded.

As expressly stated in the argument, both by counsel for the petitioners and by counsel for the respondents, and as appears from recitals contained in a petition for rehearing printed in the record, to which we shall hereafter more particularly refer, the defendants who had removed this action to the Circuit Court in December, 1903, filed in that court their bill of complaint, in which they made the plaintiffs in this action defendants. The bill, after substantially reiterating the averments which we previously recited, and which were contained in the answer filed in this cause, prayed that the further prosecution of the action be perpetually enjoined. The right to prevent the further prosecution of the action at law was based on the assertion that the law action "clouded your orators' title to the land in suit; that your orators' defenses are equitable, and that the pendency of said suit and the cloud cast on your orators' title works irreparable injury and damage to your orators and that they have no adequate remedy at law."

The following demurrer was interposed to the bill of complaint:

"First. Plaintiffs are estopped from attacking their own title.

"Second. The deed under which the defendants claim has been adjudged a good and valid title.

"Third. The complaint comes too late, the defendants having filed a suit in law, and the plaintiffs have answered to their demands, in which they set up a defense, which if sustained will be adequate in law.

"Fourth. That the allegations of plaintiffs' bil of complaint is simply a reiteration of their answer in suit No. 276 in the

Circuit Court of the United States for the Western District of Louisiana, at law, and that the allegations therein contained and set forth set up a plea of estopped *in pais* and constitute a complete and adequate remedy at law.

"Fifth. That the bill of complaint discloses no right or cause of action.

"Finally. Defendants especially demur to the right of plaintiffs to bring their bill in equity, as neither the law nor the jurisprudence of this State authorizes or provides suits in equity, and especially is this so as to real estate situated in the State. Hence, defendants *prove* that the injunction herein asked for be denied. That this branch of the case be dismissed at plaintiffs' cost and suit No. 276 be proceeded with according to law."

After argument, and on February 16, 1904, a decree was entered in favor of the respondents, in which it was recited that "The court sustained the demurrer and dismissed the suit at cost of complainants." This action, which had in the meanwhile been pending in the Circuit Court, upon the issues made up as heretofore stated, was tried and resulted in a verdict and judgment in favor of the defendants. Error having been prosecuted from the Circuit Court of Appeals in that court on April 4, 1905, the judgment was reversed and the cause remanded. The court did not pass upon the merits, because it found that the citizenship of the Lutcher & Moore Lumber Company, the corporation defendant, was not adequately averred in the petition for removal, and therefore the proper basis for jurisdiction in the court below had not been laid (136 Fed. Rep. 404) and a petition for rehearing was refused. 139 Fed. Rep. 1007.

In the Circuit Court, after the receipt of the mandate of the Circuit Court of Appeals, plaintiffs objecting and excepting, the defendants, in accordance with leave granted, amended the averments of citizenship in the petition for removal so as to cause them to be in all respects adequate. Subsequently, upon grounds which it is not necessary to state, plaintiffs

filed a paper styled a demurrer to portions of the answer of the defendants and pleas of *res judicata* and estoppel. The case was tried the second time to a jury in October, 1906. During the progress of the trial the deposition of J. A. Lovett, one of the original vendors of Knight, was offered by the defendants. The testimony tended to show that the note for $14,500, described in the act of sale by which Knight had acquired the property as having been given as part of the purchase price, had not been paid by him prior to the death of his first wife, and that it had subsequently been paid out of the purchase price realized from the various sales which were assailed, and that the amount was therefore a debt of the community, and the plaintiffs as heirs of their mother could not attack the sales without tendering their share of the community debt, which had been paid as the result of the sales. This testimony was excluded by the court, because, among other reasons, it was held not to be competent under the defenses made in the answers. Thereupon the defendants requested to be allowed to amend on the ground that on the former trial the testimony had been admitted as within the issues arising from the answers, and that the defendants "therefore took no steps to provide for the contingency of a change in the opinion of the court by amending their answers so as to clearly make such defenses admissible." To the action of the court in refusing to allow this amendment an exception was taken. Differing from the first trial, there was a verdict in favor of the plaintiff, upon which judgment was entered. Various exceptions additional to those to which we have just referred were taken by the defendants. Without going into detail it suffices to say that these exceptions were varied in character, embracing all the defenses made in the answers and covered rulings of the court on the admission and rejection of evidence and the refusal to give requested instructions. On error the case again went to the Circuit Court of Appeals for the Fifth Circuit, and as the result of the numerous exceptions taken below the assign-

ments of error in substance presented for decision the many questions raised in the trial court.

The Circuit Court of Appeals affirmed the judgment of the trial court, and the opinion delivered by it is as follows: "By the Court: After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiff in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law, we therefore affirm the judgment of the Circuit Court." A lengthy petition for rehearing was filed on December 26, 1907, and a few days thereafter there was also filed what was styled "Motion by plaintiffs in error to withhold mandate, stay proceedings, and order trial of the equitable issues, with suggestions of *res judicata* and waiver." Both in the petition and in the motion counsel contended that contrary to the ruling of the Circuit Court of Appeals the trial court held all the issues properly triable on the law side of the court, and that the plaintiffs in this action never at any time suggested that any of the matters of defense were equitable, and to dispose of the cause as the court had done would deprive the defendants of their rights and entail great hardship upon them. The defendants also incorporated in the motion the bill of complaint filed in the equity cause heretofore referred to and which was instituted by them to enjoin the prosecution of this action, as also the demurrer and the decree of dismissal. In connection therewith the suggestion was made that the decree in said cause ought in conscience to be treated as *res judicata* of the question of the nature of the defenses interposed in this action. Elaborate argument was advanced to sustain the contention that the defenses introduced amounted only to a denial of the case made by the plaintiffs, and that the evidence excluded by the trial court should have been received, and upon the undisputed record a verdict should have been directed for the defendants below. The appellate court was asked to allow an oral argument of the

petition for rehearing: "In view of the fact that the case has been disposed of on questions not raised by either party, and not considered when this cause was submitted, and in view of the attitude of the trial court with reference to the defenses being at law and not in equity, and in view of the attitude plaintiffs in error have been placed in, because of this question having been determined adversely to its rights for the first time in this court." The record does not show that any formal disposition was made of the petition for rehearing, and the motion to which we have referred, other than an entry, dated January 22, 1908, reading as follows: "Ordered, that the issuance of mandate in this case be, and it is hereby, stayed for thirty days from this date." The case thereupon came here in consequence of the allowance of a writ of certiorari.

The record unquestionably establishes that the Circuit Court, with the acquiescence of all parties, treated the defenses interposed by the answer of the defendants as legal in their nature. Aside, however, from the strict record, both the respondents and the petitioners call our attention to the transcript containing the proceedings in the equity cause. Indeed, counsel for respondents particularly press upon our attention that the defendants below, plaintiffs in the equity cause, acquiesced in the decree entered against them in the Circuit Court in such cause by not appealing therefrom, and that "it binds and estops them from now urging the same matters set up in that bill." There is no denial, but, on the contrary, by necessary implication, counsel for respondents admit the truth of the statement made in the petition for rehearing, filed in the Circuit Court of Appeals, that the cause was disposed of by that court "on questions not raised by either party, and not considered when this cause was submitted," and contrary to the "attitude of the trial court with reference to the defenses being at law and not in equity."

It is a reasonable inference that when, after the removal of the cause, the defendants filed their bill of complaint setting

up the defenses which they had urged in their answer in this action, such course must have been suggested by the fact that the distinction between law and equity did not prevail in the courts of the State of Louisiana, and that therefore it was well for them after they had removed the cause into a court of the United States to seek to conform to the practice there prevailing, and, in any event, to pursue a course which would render it certain that in the new forum they would not be deprived because of the form of pleading of their right to have their defenses passed upon. The plaintiffs in the action at law (this action) who were the defendants in the equity cause, having as a defense to that cause insisted that the defenses were not cognizable in equity, and having prevailed in such contention were certainly in conscience placed in a position where they could not by a change of attitude assert that the defenses were legal in their nature and thus deprive the defendants of all means of defense in this action. Indeed, the record does not intimate that they sought to do so, since it affirmatively establishes that the plaintiffs in this action, after having obtained as respondents the adjudication in their favor in the equity cause, an adjudication which was as well binding upon them as upon the complainants, acquiesced in the decree, an acquiescence which was manifestly concurred in by the opposing parties and sanctioned by the trial court. The case is altogether unlike that which would be presented by an objection urged by the respondents to a bill in equity, against the power of the court to exert jurisdiction over a cause of action indisputably cognizable only in a court of law, whereby a deprivation of the constitutional right of trial by jury would result. In this case, on the contrary, the question considered did not concern the inherent jurisdiction of the court over the subject-matter. The decision of the question before us is controlled by the case of *Burbank* v. *Bigelow*, 154 U. S. 558. That was an action at law in which the plaintiff recovered judgment. In this court, for the first time, the objection was made by the unsuccessful

party that the matter of the demand of plaintiff was one of equitable cogniza The court, however, said (p. 559):

"The objection that the matter of plaintiffs' demand is one of equitable cognizance in the Federal courts cannot prevail. No such objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court."

Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard.

It is undoubted that by the operation of the writ of certiorari, granted in accordance with the provisions of the Judiciary Act of 1891, the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that court. Certain is it also that the Judiciary Act of 1891 contemplates that, as a general rule, where under its provisions a case comes to this court on certiorari to a Circuit Court of Appeals it will be disposed of so that the mandate of this court, to avoid circuity, will go directly to the Circuit Court. The great purpose of the act of 1891, however, to which all its provisions are subservient, is to distribute the jurisdiction of the courts of the United States, and thus to relieve the docket of this court by casting upon the Circuit Courts of Appeal the duty of finally deciding the cases over which the jurisdiction of those courts is by the act made final. The power to certiorari in accordance with the act, in its essence, is only a means to the end that this imperative and responsible duty may be

adequately performed. As it is patent from the statement we have made that the only ground upon which the power to certiorari could have been exerted was the failure of the court below to consider the case before it, we think this record presents an exception to the general rule of procedure above referred to. In other words, in a case like this we think the judgment of the Circuit Court of Appeals must be reversed and the case be remanded to that court to the end that the duty to hear and decide it may be performed. To hold otherwise would be repugnant to the plain intent of the act of 1891, since it would recognize a practice by which the concededly essential purpose of the act of 1891 could be disregarded or be made practically of no avail.

The judgment of the Circuit Court of Appeals is reversed and the case is remanded to that court for further proceedings in conformity with this opinion.